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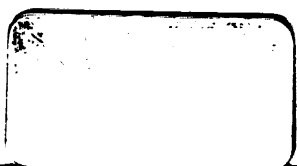
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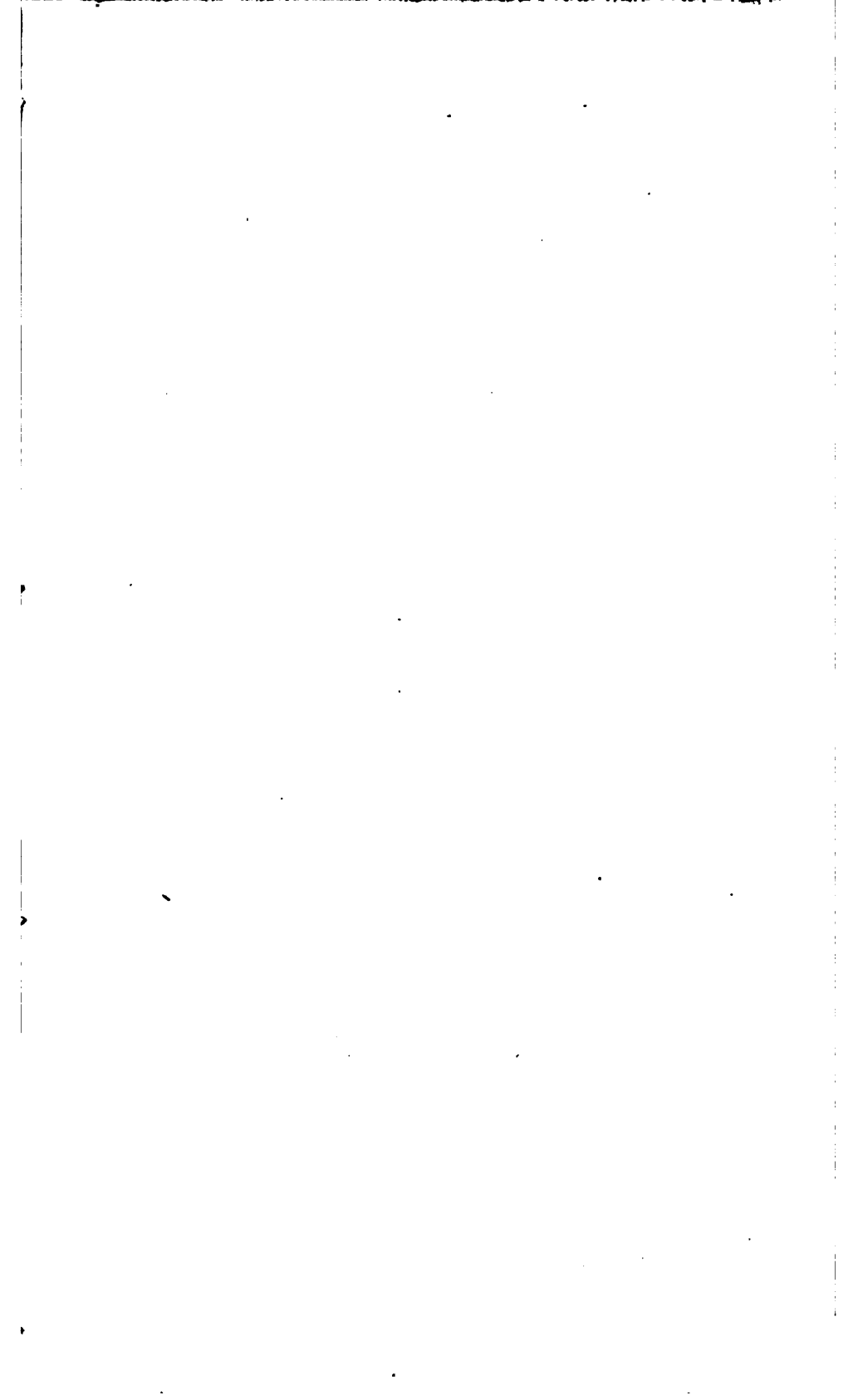
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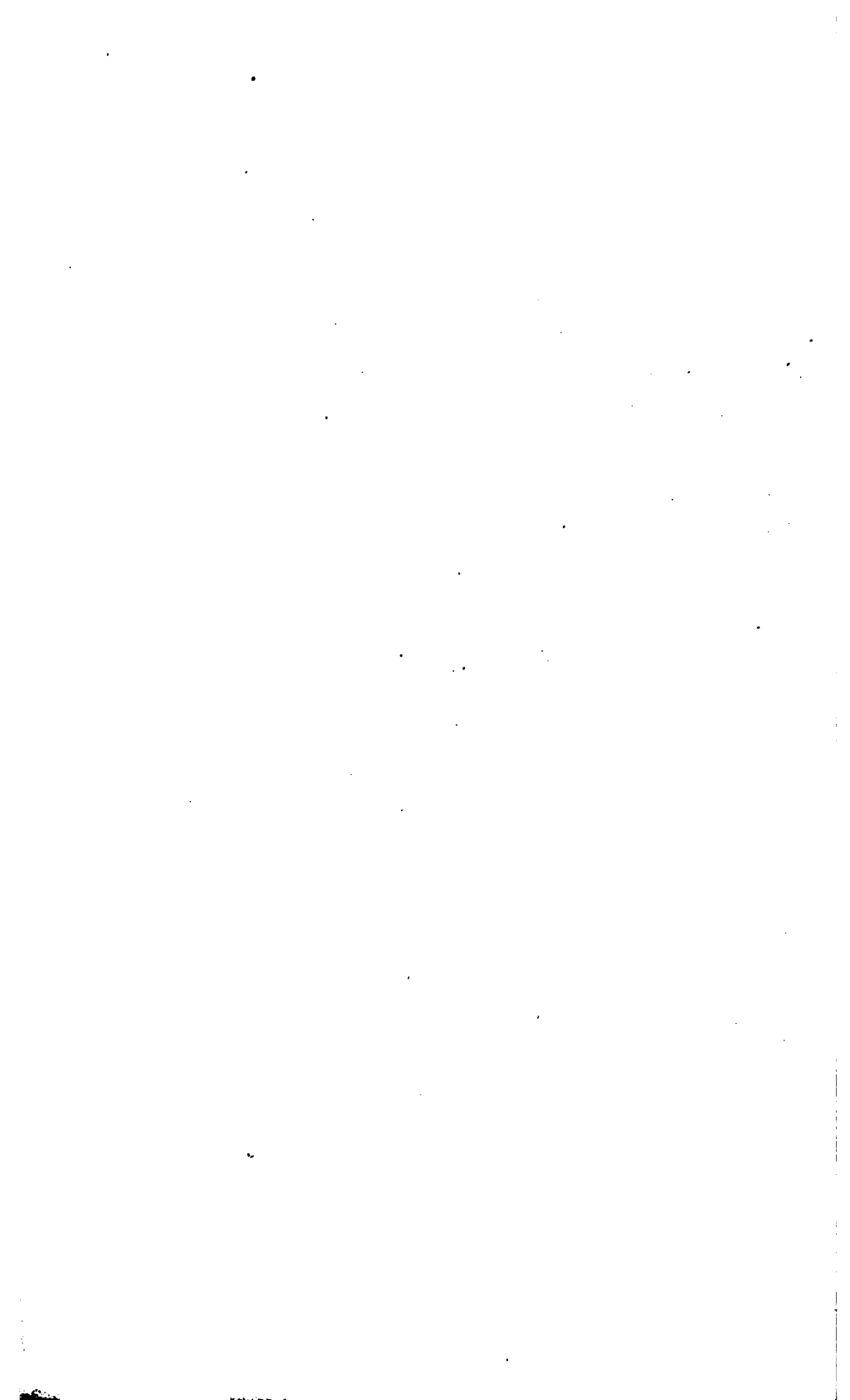












REPORTS OF CASES
DECIDED IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES Circuit court.
FOR THE
(NINTH CIRCUIT.)

REPORTED BY
L. S. B. SAWYER,
COUNSELOR AT LAW.

VOLUME III.

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J U D G E S
OF THE
U. S. CIRCUIT AND DISTRICT COURTS,

FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD,

Justice of the Supreme Court allotted to the Circuit.

HON. LORENZO SAWYER,

Circuit Judge.

DISTRICT JUDGES.

HON. OGDEN HOFFMAN, . . District of California.

HON. MATTHEW P. DEADY, . . District of Oregon.

HON. EDGAR W. HILLYER, . . District of Nevada.



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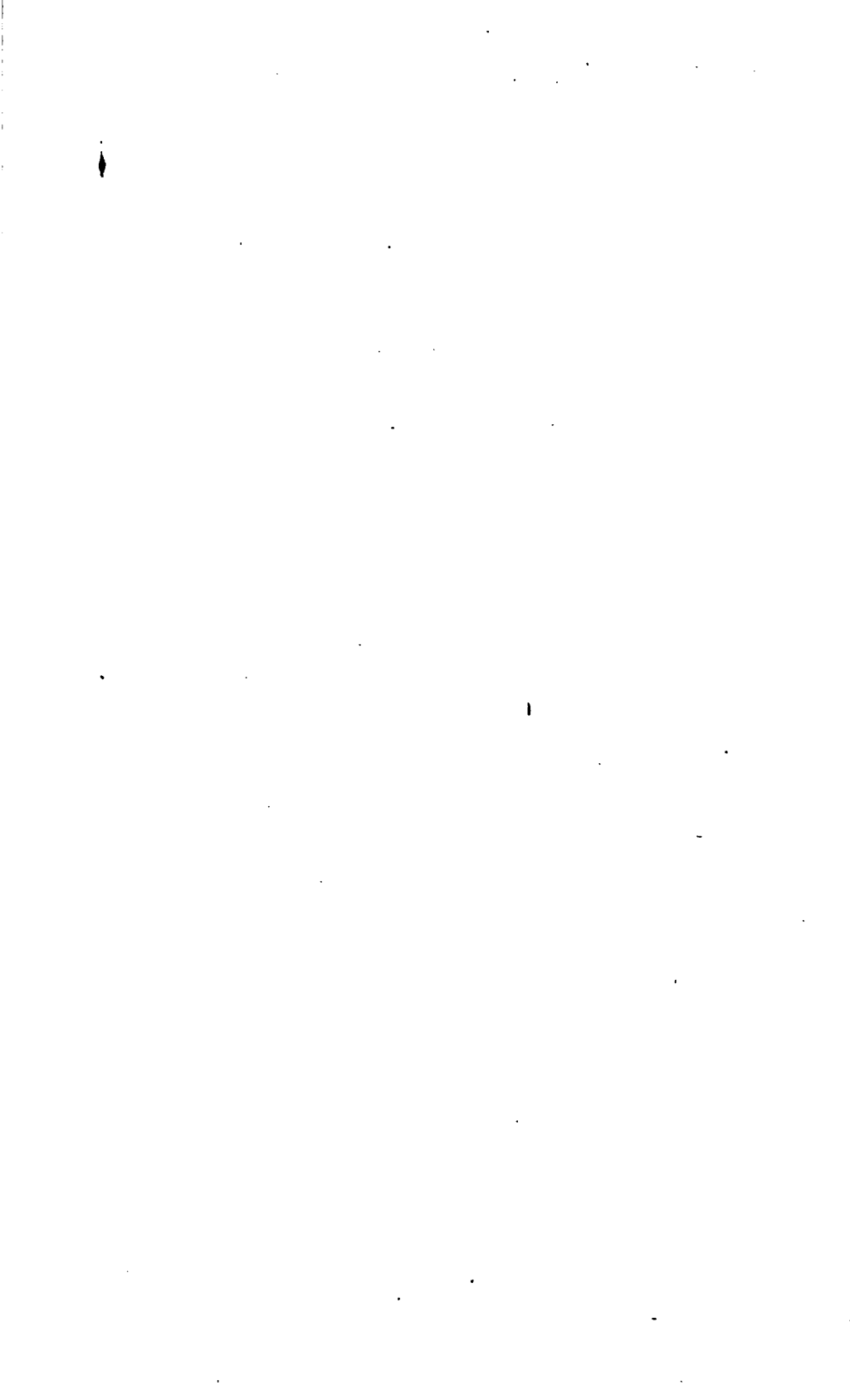
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DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

THE SCHOONER WITCH QUEEN.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 4, 1874.

1. LIEN ON VESSEL IN CUSTODY.—An owner who has regained possession of his vessel after seizure, either by successfully defending the original suit or by paying or giving bonds for the payment of the debts for which she was seized, cannot defeat an otherwise valid lien on the ground that the contract out of which it arose was made, and the consideration for it rendered, before the release and while the vessel was in the custody of the law.

Before HOFFMAN, District Judge.

F. B. Mildram, proctor for libellant.

E. J. Pringle, proctor for claimant.

HOFFMAN, J. The libel in this case is filed to recover compensation for services rendered by the libellant to the vessel as shipkeeper. At the time the alleged contract for these services was made, the vessel was in the custody of the marshal, having been seized on a warrant out of the admiralty in various suits then pending. She has since been released on bond, and on coming into the hands of her owner she was again libeled and seized in the present suit.

It is objected that inasmuch as she was in the custody of the law at the time the alleged contract was made, and the

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services rendered, the owner could not, by any contract which he might make, create any valid lien upon her.

In support of this view, the advocate for the claimant contends that the State statute, under which this lien is claimed to arise, and which authorizes a proceeding *in rem*, cannot be construed as intended to confer a right of action in a State court against a vessel in the custody of this court, and such, it is argued, would be its effect if the lien now claimed be allowed.

It is further argued that any lien, whether maritime or by municipal law, is founded upon a supposed credit given to the *rem*, and that no such credit can be given where the vessel is in the custody of the court, and that "no lien can grow out of a contract made by a party not having any possession or control, and where the party in possession (the court) is confessedly not liable."

That if such liens could be created while the vessel is in the custody of the court, they would attach to the vessel in the hands of a purchaser at the sale by the marshal, and the court would thus be unable to give a good title.

To determine the validity of these objections, it will be necessary to consider what are the relations of the owner to a vessel attached under a warrant of the admiralty and in the possession of an officer of the court, and what are the rights which third persons may acquire against the vessel, in the nature of a privilege or lien; and in doing so I will, for clearness, assume in the first instance, that the lien now claimed is such as the maritime law recognizes, and that it would be incontestable, except for the fact that the contract which gave birth to it, was made and the services rendered when the vessel was *in custodia legis*.

1. It is not contended that the owner of a vessel seized under a process *in rem*, and in the custody of the court, can, by any contract he may enter into with third persons, interfere with or affect the action of the court in proceeding to condemn and sell the vessel to satisfy the demands for which she has been libeled. The security of the libellants can in no degree be impaired by any act of the owner after the seizure, nor can any of the acquired liens so created be

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Opinion of the Court—Hoffman, J.

set up either against the vessel in the hands of a purchaser at the judicial sale or against her proceeds when brought into court for distribution.

Thus a wharfinger whose demand has accrued after seizure, can set up no lien on the vessel even if his possession could be considered such as to create one, but he must present his claim to the court for allowance, as part of the expenses of justice; and if he has obtained possession of the *rem*, or having become the purchaser, refuse to pay the whole purchase-money, the court will, by summary process, enforce a redelivery or payment. (*The Phæbe Ware*, 362.)

Even where a party is in possession at the time of the commencement of the suit of some of the apparel of the ship (*e. g.* sails), which he has repaired, and on which he has a lien at common law, the court will order him to deliver them up and look to the court for the protection of his rights. (*The Harmonie*, 1 Wm. Rob. 178.)

But the point under consideration is different from that presented in these cases.

The inquiry here is, can the owner, after he has regained possession of the vessel, either by successfully defending the original suit or by paying or giving bonds for the payment of the demands for which she has been seized, defeat an otherwise valid lien, on the ground that the contract on which it is claimed was made, and the consideration for it rendered, before the release, and while the vessel was still in the custody of the law?

Property in the possession of an officer of a court under lawful process is in the custody of the law, and the possession of the officer partakes of the inviolability of the law itself.

It, and the rights growing out of it, will be firmly upheld against all interference which might obstruct the court in the fulfillment of its functions, or impair the rights of the suitors before it.

But the effect and consequences of taking property into the custody of the court must be measured by the objects to be attained by it, and there would seem to be no reason to deprive the owner of any right, the exercise of which is

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[March,

consistent with the attainment of the objects of the seizure and the enforcement without hindrance or diminution of the rights growing out of it.

If the owner of property so situated is incapable of making a contract which will give rise to a lien or privilege, he would be equally incapable of making an express hypothecation or mortgage, or even, so far as is perceived, making a valid bill of sale of the vessel; and yet these contracts, subordinated as they would necessarily be to the authority of the court, and the rights of the suitors before it, he might make, without in the least degree interfering with the one or impairing the other.

The consequences of the principle contended for might be pernicious in the extreme.

The owner would be deprived of all power of disposing of his property, or, on the faith of it, obtaining the means to make necessary repairs, supplies for a new voyage, or funds to enable him to satisfy the very demands for which she had been seized.

He also might use this alleged incapacity as an instrument of fraud; for, by suffering the vessel to remain under attachment in the custody of the marshal's ship-keeper (a circumstance which might easily escape observation), he might, while she so remained, cause extensive repairs to be made or supplies furnished, and upon her release, deny all right of recourse against the vessel on the pretense that she was *in custodia legis* when the repairs were made, or the supplies furnished.

I see, therefore, no reason for the principle contended for, either in the interests of the owner or those of commerce, or those of the administration of justice.

It is said that liens are grounded upon the credit, express or presumed, given to the vessel, and that no such credit can be given to a vessel in the custody of the law, for such a credit is impossible. But this is obviously a statement of the position of the advocate of the claimant, not an argument in support of it.

It is equivalent to saying that no lien was contemplated by the parties because none could, by law, be created, and

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that no lien was created by law, because none was contemplated by the parties. Where there is no proof of an exclusively personal credit, a party dealing with the owner of a vessel is presumed to look to the remedies which the law gives him. What those remedies are, is in this case the very question at issue.

I am, therefore, of opinion, that the fact that the contract under which the lien is claimed, was entered into while the vessel was in the custody of the law, is no bar to a libel *in rem*, to enforce the lien against the vessel in the hands of the owner, to whom she has been restored on dissolution of the admiralty attachment.

2. If this general proposition be true, I do not perceive that the circumstance that the lien arises under the municipal, and not under the maritime law, will make any difference; provided this be a case where the State has legislative authority to create a maritime lien, and this court has jurisdiction to enforce it. On these points no objection was raised.

The suggestion that the framers of the State statute could not have contemplated a lien or a remedy *in rem* against a vessel in the custody of this court, is answered by the observation that no such intention is attributed to the framers of the statute, and no such effect given to the law.

The lien claimed in this case, though founded on services in part rendered while the vessel was in the custody of the law, attached to her only after she had been restored to the owner. It is sought to be enforced against her, not in the hands of a purchaser at a sale ordered by the court, but in the hands of her original owner, by whom the contract to which the law annexes a lien was made.

The evidence with regard to the facts is irreconcilably conflicting. * * * * *

Decree for the libellant.

CHARLES E. TILTON v. THE OREGON CENTRAL
MILITARY ROAD CO. ET AL.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 25, 1874.

1. ASSESSMENT, WHEN VOID FOR UNCERTAINTY.—An assessment of real property should substantially comply with the requirements of the statute (Or. Code, p. 898) which requires each tract or parcel of land to be designated according to the United States surveys, if it be a subdivision of the same, or otherwise by specific metes and bounds or other certain description; therefore an assessment to the O. C. M. R. Co. of 196,008.99 of acres of land in Jackson county, in gross, without any other designation or description of the same, is void for uncertainty.
2. SAME SUBJECT.—An assessment of real property which contains no valuation of the same except this: "Total value of taxable property, 245,011," there being no mark or sign to indicate whether such figures were intended to represent eagles, dollars, cents or mills, or other thing capable of being numbered, is void for uncertainty.
3. COLLECTION OF TAX, WHEN RESTRAINED.—A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof.
4. TAX DEED, A CLOUD ON TITLE.—Under the laws of Oregon (1865, p. 10), "a tax deed is primary evidence of title and the regularity of the prior proceedings, which evidence can only be overcome by the proof of certain facts *dehors* the deed; therefore the same casts a cloud upon the title of the property.

Before DEADY, District Judge.

MOTION for a provisional injunction heard and determined upon the bill—no one appearing for the defendants.

Cyrus Dolph and E. C. Bronaugh, for the complainant.

DEADY, J. It appears from the bill that the complainant is a citizen of New York. That the defendant, "The O. C. M. R. Co.," is a corporation formed under the laws of Oregon, with a capital stock of \$100,000 divided into 400 shares of \$250 each, and the defendant, McKenzie, is the sheriff of Jackson county, Oregon. That the O. C. M. R. Co. is the owner in fee of a large number of acres of land

* Compilation of 1874, p. 767.

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in said county, in 300 and odd distinct parcels, particularly described by township, section and range, and the plaintiff is the owner of thirty-one shares of the capital stock of said company. That said company is assessed upon the assessment-roll of Jackson county for 1873 as the owner of 196,008.98 acres of land in said county, in gross, without any other designation or description thereof, and without any valuation of the same other than this: "Total value of taxable property, 245,011." That the taxes levied upon the lands so assessed to said company by the proper authorities of said county, amount to \$4,410.20, and the same will be collected by the defendant McKenzie by the sale of said lands, or so much thereof as may be necessary for that purpose, and a cloud be thereby cast upon the title of said company, unless restrained by the order of this court; and that said assessment is illegal and void for want of certainty in the description and valuation of said lands.

That this assessment is illegal and void, there is no room for doubt. The law prescribes that the assessor in making an assessment of real property shall set down in the assessment-roll, in separate columns, the following:

1. A description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, range, and section in which the land lies; or, if divided into lots and blocks, then the number of the lot and block.

2. The number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into blocks and lots.

3. The full cash value of each parcel of land taxed.

4. In case the land be other than a subdivision of the United States survey, or lots and blocks, it must be described by specific metes and bounds, or otherwise, so as to make the description certain. (Or. Code, p. 898.)

In the case under consideration, the assessment-roll contains no description of the land whatever, except that there is in all 196,008.99 acres, situate somewhere in Jackson county. Neither the township, range, nor section, nor the metes and bounds of the tract, nor any parcel or portion of it, is given.

Neither is there any cash value given in this roll of the whole or any portion of this land.

It should have contained a valuation of each parcel and of the whole. The figures "245,011," entered in the column headed "Total valuation of taxable property," do not indicate any value. They are mere numerals signifying an abstract number.

In *Hurlburt v. Butenop*, 27 Cal. 54, and *People v. Savings Union*, 31 Cal. 135, it was held that an assessment was void for want of a valuation of the property, where the figures in the valuation column were entered without any mark or sign to indicate whether they were intended to represent eagles, dollars, cents, or mills. Say the court in the latter case: "In the assessment-roll, in the column headed 'valuation,' there is nothing whatever to indicate what the figures are intended to represent; and, under the authorities cited, we are not authorized to say they mean dollars. They are simply numerals—'barren figures'—that are as often employed to indicate anything else that may be numbered, as dollars; or, if money is indicated, the denominations may be either eagles, dollars, cents or mills."

But this assessment is clearly void on account of the omission to describe the lands and each separate parcel thereof by legal subdivisions according to the United States survey, or by specific metes and bounds, or in such other manner as to make the description certain, as required by law.

The question has not been passed on by the Supreme Court of the State, but in *Kelsay v. Abbott*, 13 Cal. 616, an assessment was held void because the statute was not substantially complied with in the matter of the description of the property. This case has been followed by *Lachman v. Clark*, 14 Cal. 133; *Moss v. Shear*, 25 Cal. 44; *People v. Sneath et al.*, 28 Cal. 615; *Smith v. Davis*, 30 Cal. 537; *People v. Savings Union*, 31 Cal. 135, and *Taylor v. Donner*, Id. 481.

The ruling in these cases was recently followed in *Huntington v. The Central Pacific Railroad Company et al.*, 2 Sawyer, 503, where an assessment of the defendant's

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railway in several counties of the State was held void, and the collection of the tax thereon restrained, because the same was "not made in accordance with the provisions of the statute" in the matter of the description of the land or lands upon which the ties and rails were laid.

But although the assessment is illegal and void, that fact alone is not sufficient to authorize the interference of a court of equity to restrain the collection of the tax.

"It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." (*Dows v. City of Chicago*, 11 Wall. 110; *Ewing v. St. Louis*, 5 Wall. 418; *Hanniwinkle v. Georgetown*, 15 Wall. 548; *Coulson v. Portland*, 1 Deady, 487; *Moore v. Smedley*, 6 John. Ch. 30.)

According to the allegations of the bill, and the course of proceedings prescribed by the law of this State, the defendant McKenzie, if not restrained, will proceed to levy upon and sell the lands of the O. C. M. R. Co., or sufficient thereof to pay this tax and the costs of the proceedings; and in due time thereafter will make and deliver a deed therefor to the purchaser, which, upon its face, will pass the title and carry with it the presumption that all the proceedings preliminary thereto were done and had in accordance with the law, which presumption can only be overcome by proof of either:

"1. Fraud in the assessment or collection of the tax.

"2. Payment of the tax before sale, or redemption after sale.

"3. That the property was sold for taxes for which the owner of the property, at the time of the sale, was not liable, and that no part of the tax was levied or assessed upon the property sold." (Ses. Laws, 1865, p. 10.)

The deed must contain a description of the property sold; but of the preliminary proceedings it need only state the amount bid, the year in which the tax was levied, that it was unpaid at the time of sale, and that two years had since elapsed, and no redemption had.

The description required to be inserted in the deed is of the property sold; and although the description on the assessment-roll may be so insufficient as to render the assessment void, it does not follow that that fact will appear in the deed. The collector may levy upon any one or more of the 300 and odd distinct parcels of real property belonging to the O. C. M. R. Co., in Jackson county, and sell and convey the same by proper and sufficient description on account of the non-payment of this tax. A warrant for the collection of delinquent taxes is to be deemed an execution against property, and executed as such. (Or. Code, p. 909.)

It is not clear that the legal effect of such a deed could be avoided, unless it was held that the tax for which the land was sold was not "levied or assessed" thereon, because of the insufficiency of the description and valuation in the assessment-roll. The assessment could not be held fraudulent because simply *insufficient or erroneous*. A mistake or omission is not necessarily a fraud.

But however this may be, this deed would at least cast a cloud upon the title. As was said by the court in *Huntington v. The Central Pacific Railroad Company et al.*, supra: "It would only be necessary for the plaintiff to produce his deed to show title. It would then devolve upon the defendant to show affirmatively, by evidence *dehors* the deed, such fatal defects in the assessment as it is admissible to show under the provisions cited, the deed itself being conclusive as to other particulars; and this brings it within the test by which the question is determined whether a deed would be a cloud upon title established in this State by the decisions of the Supreme Court."

In *Pixley v. Huggins*, 15 Cal. 133, the rule by which to determine whether a deed would cast a cloud upon the title or not, was stated as follows: "Would the owner of the property in an action of ejectment, brought by the adverse party, founded on the deed, be required to offer evidence to defeat the recovery? If such proof would be necessary, the cloud would exist; if no proof would be necessary, no shade would be cast by the presence of the deed."

It appearing, then, that the assessment and tax are in-

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valid, and that if the collection of the tax is enforced, it will necessarily result in a deed being made to the property, or some portion of it, which will cast a cloud upon the title thereof, the complainant is entitled to an injunction.

Let a writ of injunction issue, according to the prayer of the bill, until the further order of this court.

UNITED STATES v. CARGO OF SUGAR.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

1. BOND FOR VALUE—APPRAISEMENT.—Where property under bonds for duties is seized in a warehouse, the bond for value under the 89th section of the act of 1799 should represent its full market value, duties included.

Before HOFFMAN, District Judge.

Delos Lake, United States Attorney.

Milton Andros, of counsel for United States.

Doyle & Barber, for claimants.

HOFFMAN, J. An application is made by the owner and claimant of the goods proceeded against in this suit, that the appraisers be instructed to appraise the goods at their cash market value, less the duties legally chargeable upon them, and that upon giving bond for the value so ascertained, and producing a certificate of the collector that the duties have been paid, the goods be delivered to the claimant.

This application is opposed by the district attorney, who contends that the goods should be appraised at their full market value, without deducting the amount of the duties.

It appears that two separate entries at the custom-house were made of the goods—a part was entered for consumption, the usual deposit made to cover the duties, and a delivery order obtained by the importer. Before this order

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was executed the goods were seized. For the remainder of the goods a warehouse entry was made, and the bond required by the acts of August 30, 1842, and August 6, 1846, duly executed. They were still in the warehouse when seized.

The question presented to the court is important. It has been very fully discussed by the learned judge of the southern district of New York, who has delivered a long and elaborate opinion, in which the whole subject is reviewed.

The conclusions at which he arrives are, that the bond for value under the 89th section of the act of 1799 should represent the full value of the property to the importer at the time of seizure.

That when the property is seized in his hands, after the duties are paid, its value to him is its market value, which necessarily includes the duties.

But where property under bonds for duties is seized in a warehouse, its full value to the importer at the time of seizure is its market value, less the duties; and for this amount the bond on delivery must be given.

I have been unable to assent to the correctness of these conclusions.

It is observed by the learned judge that "the interpretation uniformly given to the 89th section of the act of 1799 is, that the sum at which the property seized is to be appraised, is its value, as of the time and place of seizure."

No authorities are cited in support of this position. With great deference it appears to me to involve a fundamental error.

The government on a seizure of forfeited goods acquires a right of property, which it enforces by a condemnation and sale. As until condemnation the fact of forfeiture is unascertained, the claimant is allowed to obtain his goods on substituting in their stead a bond for their value. The sum for which this bond is to be given should obviously be a sum equal to the value of the goods to the government at the time they are delivered to the claimant, or the equivalent of the amount which might then be realized from them by a sale in the market. Nothing less will put the government

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in the same position as if it had retained the goods, or prevent its being a loser by the pretended substitution of an equivalent in value.

To estimate this value as of any other time than that of the appraisement and delivery might, according to circumstances, be a hardship and injustice either to the government or to the claimant. The seizure may have been made months previously. If in the meantime the price of the goods has declined, or their value otherwise been impaired, it would be unjust to demand of the claimant a bond for a larger sum than he can obtain for them in the market. If, on the other hand, their price has appreciated, he has no right to ask the government to surrender goods which have become its property by the forfeiture without receiving a bond of an amount equal to their full value when it surrenders them. This value is evidently the price which the goods then command in the market.

When the claimant applies to the court for a delivery of the goods seized, on payment of the duties and giving a bond for their value, he, in effect, asks that the property be delivered to him, on which, as soon as it reaches his hands, the whole market value can be realized. This is its true value, both to him and to the government. If he be permitted to give a bond for a less amount he will obtain his goods at less than their true value, and the government will part with them on a security representing a smaller sum than the goods would be worth if retained in its possession.

It is plain that in cases of seizure, as in all other cases where property in the possession of the law is surrendered on substituting a bond for its value, the bond should be for a sum equivalent to the value of the goods, at the time of the delivery, to the party who surrenders, and to the party who receives. This is evidently a sum no greater and no less than the market value of the goods at the time of the delivery.

But even if it were true that the basis of appraisement is the value of the goods to the importer at the time and place of seizure, I do not perceive why that value is to be taken as the market value less the duties.

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The importer has given bond for the duties, and this bond he is liable for, unless the goods be re-exported. If the goods perish in the warehouse he still remains liable for the duties, and his loss is the amount of their market value. If he forfeits the goods in consequence of his crime he must still pay the duties, and the loss he sustains is the market value of his goods. This loss the government alleges he has incurred, and if while the question is undetermined he seeks to obtain his goods he must give bond in the sum they were worth to him when his ownership of them was divested by the forfeiture and seizure.

Even then, on the hypothesis that the appraisement is to be as of the time and place of seizure, it is clear that the basis of appraisement must be the full market value of the goods at that time without deducting the duties.

But for the reasons assigned above, I think it evident that the value must be fixed as of the time the appraisement is made and the goods delivered to the claimant.

But it is said, in the opinion referred to, that "in case such a bond as the government claims to receive in this present case be given, the importer will lose if the property is condemned, in the suit, not only what was the value to him of the property in warehouse at the time of its seizure, but in addition a sum equal to the amount of the duties chargeable thereon; and if after thus bonding the property, he withdraws it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount has been included in such delivery bond. He will thus, in case of condemnation, lose more than he would if the property was not delivered to him on bond, but was to remain in the hands of the government and be sold by it. In each case the same offense is charged and has been committed, for which the property is forfeited. In each case the property is in warehouse under bond for duties. The merchant is equally guilty in each case; but if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so according to the views urged by the government without imposing upon himself a liability in case the property is

condemned, which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of the eighty-ninth section of the act of March 2, 1799. * * * * To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then if the property is condemned in the suit the importer will lose the same amount as if he had not bonded the property and no more, and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding*provided for by the eighty-ninth section of the act of 1799."

I have cited this passage at length, for it contains a full statement of the grounds on which the learned judge based his opinion. The fallacy of the fundamental idea on which it rests appears to me evident.

The penalty attached by law to the offense charged is the forfeiture of the goods seized, or their value.

The payment of duties is not exacted as any part of the penalty. The obligation to pay them attaches absolutely as the consequence of the importation, and this payment is exacted, whether the goods be forfeited or not, as a condition precedent to the delivery of them to the importer. If the goods be entered for warehouse the importer has the right within a limited time to re-export them and procure the cancellation of his bond; but in all cases where the goods are delivered to the importer, as the claimant now asks the court to order, the duties must first be paid.

If the goods are condemned the loss to him is precisely the same, whether he bonds them, as the government now claims he must do, or whether he suffers them to remain in the custody of the court and be sold under its decree.

In either case he must pay the duties, for his bond for duties can only be canceled by the exportation of the goods, and this by his own crime he has put it out of his power to do. Besides the duties, he loses in either case the value of his goods, and *no more*.

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If he suffers them to be sold this is evidently the amount of his loss. But if he obtains their delivery to himself on giving bond for their full market value the bond will represent only what they are worth to him, and the sum he can obtain for them in the market. If the goods are subsequently condemned he pays over their proceeds in satisfaction of his bond, and his liability is thus precisely what the statute creates—liability to pay the duties, and as a penalty for his offense the loss of his goods or their proceeds.

The fallacy of the argument so often urged, that by exacting a bond for the full market value, including duties, and also requiring the duties to be paid, the court obliges the importer to pay duties twice, is also apparent.

He pays duties but once, and he gives bond for the amount which the property is worth to him when delivered, and which, if the appraisement be just, he realizes from its sale. If he be permitted to take his goods on giving bond for their market value, less the duties, the inevitable consequence will be that he will save, and the government will lose, a sum equal to the amount of the duties.

For though he pays duties in the first instance, he can sell the goods at their market price, and thus be reimbursed the duties he has paid, while the balance of the proceeds will be sufficient to satisfy the bond he has given. The goods will thus have gone into consumption in effect without payment of duties, or, to speak more accurately, the government will, though it has received the duties, recover less by precisely their amount than the value of the property, the ownership of which it had acquired by the forfeiture.

The circumstance that the goods have been seized in a warehouse can in no way affect the matter, for the claimant asks, not that the goods be suffered to remain in warehouse, and the seizure be superseded, but that they be delivered to him and go into consumption. This the court can order only on payment of duties.

He thus puts himself precisely in the position of one who withdraws goods for consumption, and the value he should

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give bond for is the value of the goods he receives, which is their market price, or the sum he can obtain for them.

Even if the importer whose goods have been seized in a warehouse, can on applying to bond them be considered as retaining any right to avoid payment of duties by re-exporting them, a single illustration of the possible results of the mode of appraisement suggested will expose its erroneous-ness. Let us suppose the market value of the goods to be equal to or less than the amount of the duties.

Such is said to have been until recently the case with regard to whisky.

Their market value, less the duties, will, in such case, be nothing—and the claimant can procure their delivery to him on giving bond in a nominal sum.

If, then, he can omit to pay the duty, and re-export the goods, or recover the duty back by way of drawback (as he may possibly do in this case under the fourteenth section of the act of August 30, 1842), he may, by a sale in a foreign market, realize from them a sum which, though less than the duties, may be considerable—while the government, which has established its title by forfeiture to the goods, will have neither duties, goods, nor a bond.

In view of the late ruling market prices of whisky, the case suggested does not seem an extreme one, but the principle is illustrated in all cases where the amount of the duties bears any considerable proportion to the market value of the goods.

It is observed by the learned judge of the southern district of New York, that “uniformity of principle and equal justice to importers, in all cases, can be carried out only by varying the basis of appraisement in the manner indicated in cases of delivery bonds, on seizures of property in warehouses.”

With all deference I must be allowed to observe that the proposed variation seems to me to introduce a discrimination between importers of different classes not justified by reason or law.

It is admitted that if the duties have been paid, and the goods are seized in the hands of the importer, he can only

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obtain them by giving bond for their full market value—or, in other words, by securing the repayment in case of condemnation of the value he receives when the goods are delivered to him. On what ground should the importer, who has made a warehouse entry, be put in a better position?

He also asks for and receives property which he can at once convert into money, and for which he can obtain by sales the sum he is required to pay in case of condemnation. The goods are worth that sum to the government, and what right has he to ask the government to surrender them without receiving a bond for their full value?

I confess, that after the fullest consideration, I have been able to discover nothing, either in the warehouse laws or the provisions of the eighty-ninth section of the act of 1799, which can give any color to such a pretension.

I regret exceedingly to be obliged to dissent from any opinion entertained by the distinguished judge of the southern district of New York, especially when it is sustained by that of his eminent predecessor.

But I cannot avoid announcing the conclusions which, after the best consideration I can give the subject, I have reached. My belief in their correctness is strengthened by the fact that they seem to be in accordance with the views entertained by the learned judge of the Pennsylvania district, whose decision, which I have not had the advantage of seeing, is referred to in the opinion of the district judge of the southern district of New York.

An order must be entered directing the goods seized to be delivered to the claimant, on his executing a bond for their appraised value, without deducting the duties, and on the production of the collector's certificate that the duties have been paid.

IN RE ISAACS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

1. **BANKRUPTCY—JOINT CREDITORS.**—An agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before bankruptcy, to prove his claim as a joint creditor of the firm against the partnership estate.

Before HOFFMAN, J.

W. W. Cope, for petitioning creditor.

Joseph Naphtaly, for creditors.

HOFFMAN, J. It appears by the statement of facts reported by the register and admitted by the attorneys for the respective parties, that on the seventh of March, 1871, the above bankrupts, by a writing under seal, entered into a contract of partnership, by which it was agreed that the parties who had previously been doing business on their individual accounts should unite their stocks of goods and uncollected book accounts, to form a joint capital for the partnership, and that the copartnership should assume and become liable for all the separate business debts of either partner, as shown by his books.

The firm having become bankrupt after incurring partnership debts, a creditor of one of the partners (and who appeared by the books of the latter to have been such), for goods sold before the formation of the partnership, offered to prove his debt as a joint debt, with a view of sharing in the distribution of the firm assets.

No evidence was offered to show that the separate creditor acceded to the substitution of the firm liability for that of the partner by whom the debt was contracted. He does not even appear to have been aware of the terms and conditions of the agreement between the partners.

The register was of opinion that the proof offered should

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not be received; and the question having been fully argued, is submitted to the court for its decision.

The question thus presented, viz., whether an agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will entitle a separate creditor who has not acceded in any way to the arrangement to prove in bankruptcy as a joint debtor of the firm, is closely analogous to that which arises where, on the dissolution of a firm, the continuing partner takes an assignment of the joint assets, and agrees to be responsible for the firm debts; and after bankruptcy, a joint creditor who has not, before bankruptcy, assented to the conversion of his debt, seeks to prove it against the separate estate of the continuing partner.

Both of these questions have frequently been submitted to the courts, and have received, with one or two exceptions, a uniform answer.

A joint debt may be converted into a separate debt, or a separate debt into a joint debt, either with or without an *extinguishment* of the original obligation.

In the former case the creditor can only rely on his debt according to its new quality, and is, therefore, entitled to only one mode of proof.

In the latter case, as the old debt still subsists, he can take advantage of it in either its old or its new form, and is consequently entitled to an election of proof. (Story on Part. 369; Collyer on Part. 767.)

As no arrangement between a debtor or debtors and third person, or between themselves, can impair or destroy the liability of either or all of them to a creditor, without his consent, it is evident that to establish an *extinguishment* of the old debt, it must appear that he has accepted the new liability as a substitute for and in discharge of the old.

But when a conversion merely is set up, i.e., the creation of a new liability, without an *extinguishment* of the old, as this is ordinarily beneficial to the creditor, less evidence of an assent by him to the arrangement will be sufficient than in cases where it is sought to substitute a separate for a joint

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liability. (Robson's Law of Bankruptcy, 599, and cases cited.)

But even where a mere conversion is set up, as in this case, evidence of the assent of the creditor before bankruptcy seems always to be required.

In the case of *Ex parte Williams* (1 Buck's Bankruptcy Cases, 13), a trader indebted entered into a partnership and brought his stock in trade into the new firm, under articles by which the joint trade was to pay his creditors named in a schedule. It was held that a separate creditor named in the schedule did not by the articles become a joint creditor of the firm.

In this case Lord Eldon says: "If it is meant to be said on the part of the petitioner, that a joint action might have been maintained by the creditors named in the schedule, against the partners immediately on the execution of the deed, and by force of the deed only, *independently of an accession to the agreement on the part of the creditors* named in the schedule, I cannot assent to the doctrine. * * * But I agree to the proposition that a very little will do to make out an assent to the agreement."

The same point was decided by Sir John Leach in *Ex parte Freeman*, Id. 471, though the question there arose in a case where a retiring partner had assigned the stock in trade to a continuing partner, who covenanted to pay the joint debts. The partners having become bankrupts, it was held that the joint creditors, not having, previously to the bankruptcy, accepted the continuing partner as their sole debtor, could not prove against the separate estate of the continuing partner.

This case, although it was overruled by Lord Eldon, seems, nevertheless, observes Mr. Collyer, to be consistent with the most of those on the same subject which preceded it, and as the grounds of Lord Eldon's decision do not appear, and as Sir John Leach decided the subsequent case of *Ex parte Fry*, 1 Glyn. & Jan. 96, in the same manner, there seems just reason to suppose that the case of *Ex parte Freeman* was rightly decided. (Collyer on Part. 774.)

In *Ex parte Lane*, 1 De Gex, 300, it was held that a

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parol agreement to convert a separate debt into a joint debt is not within the statute of frauds if the former debt is extinguished, but an assent on the part of the creditor must be shown.

The case of *Ex parte Appleby*, 2 Deac. 482, decided in 1839, was nearly identical with *Ex parte Freeman*; and it was held that a joint creditor could not prove against the separate estate of a continuing partner who had taken an assignment from the retiring partner of the joint assets, and agreed to indemnify against the partnership debts; there being no satisfactory evidence that there was no joint estate, nor that the joint creditor had *accepted* the continuing partner as his separate debtor.

So in *Kirwan v. Kirwan*, 1 Tyrwhett, 491, it was decided that mere knowledge of the dissolution of a partnership is not sufficient, although an account is continued with the new firm. The creditor must appear to have expressly, or by some act, accepted the substituted credit of the new partnership instead of the retiring partners.

Ex parte Parker, 2 Mont. Deac. & De Gex, 511, was a case where a trader, indebted to a lunatic in the amount of the purchase-money of a business and the machinery and stock-in-trade, entered into a partnership under an agreement by which the stock-in-trade and property of the business were to belong to the firm, which was to assume the liabilities of the sole business. The firm tendered an annual account in its own name, in respect to the debt, to the committee of the lunatic, who made no objection to this form of account. It was held, on the firm becoming bankrupt, that the committee was not entitled to prove against the joint estate. It was even doubted whether the committee had power, and whether the Lord Chancellor could have given him power to convert the separate into a joint liability.

It will be observed that this case is much stronger than the case at bar. The debt was for the purchase-money of the property transferred to the firm. The creditor was a lunatic, incapable of personally assenting to the conversion,

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and there was some evidence tending to show that his committee had assented to it.

Ex parte Whitmore, 3 Mont. & Ayrton, 627, was decided expressly on the ground that the creditor had assented to the conversion before the bankruptcy. The court says: "The question is solely of fact. Did the creditor intend to substitute the firm for the separate liability?"

It is unnecessary, however, to multiply citations of cases on this point, for the authorities are, with a single exception, uniform, that in proceedings in bankruptcy, at least the assent of the creditor to a conversion before the bankruptcy must be shown.

Mr. J. Story (Story on Part., sec. 370) states emphatically that "in order to produce any conversion at all, either with or without an extinguishment, there must be a sufficient consideration, and also a deliberate and mutual assent of the creditors and debtors of such conversion;" and for this he cites *Collyer (ubi sup.)*; *Gow*, on Part. 284; *Watson* on Part. 274. And the same doctrine is laid down by Robson in his recent treatise on the law of bankruptcy (p. 509), where the leading cases above quoted and many others are cited.

I have been referred to but one decision on the point under consideration by the courts of bankruptcy of the United States; but the principles above laid down have been adjudged by the courts of Massachusetts, under the insolvent law of that State, from which, as is well known, the bankrupt act was in great part derived.

In *Wild v. Dean*, 3 Allen, 579, it was held that a partnership debt is not provable against the separate estate of one of the partners, who has received an assignment of all of the partnership property, and executed a bond to his retiring partner to assume and pay the partnership debts, without evidence of an express agreement or assent by him to pay the same to the creditor as his private debt, and notice by the creditor of his election to treat it as a private debt is not sufficient.

In *Robb v. Mudge*, 14 Gray, 534, it was held that a *bona fide* transfer of partnership property to one partner, in con-

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sideration of his assuming the partnership debts, makes it his separate property, and not liable in insolvency to the creditors of the partnership who have not agreed to accept him individually as their debtor, until his separate debts are paid.

The case chiefly relied on as seeming to countenance a different rule is that of *Colt v. Wilder*, 1 Edw. Ch. R. 484, decided by Mr. Vice-Chancellor McCoun. In that case it was held that a private creditor of a partner whose debt it had been agreed between them at the formation of the partnership to treat as a firm debt, could take dividends under an assignment by the partners of all the partnership property in trust for the benefit of the creditors of the concern.

With regard to this case it is to be observed, that the question was not as to the right of the creditor to prove his debt in bankruptcy as a joint debt, but whether he had, under the circumstances, any right in equity to come in under the assignment.

Secondly. The cases of *Ex parte Peele*, 6 Ves. 602, and *Ex parte Clowes*, 8 Ves. 540, on which the learned Vice-Chancellor chiefly relies, have received a different interpretation, not only by the text-writers, but by the courts by whom they were decided.

In *Ex parte Peele*, the contest turned upon whether the partners had agreed between themselves to the conversion of the debt. With respect to this case, Mr. Collyer observes: "On this subject of assent, Lord Eldon's opinion may be gathered from his observations in the cases of *Ex parte Peele* and *Ex parte Williams*. In the former of these cases it was scarcely necessary to advert to the question of assent by the creditor to the consolidating of the debts, as it was a disputed point whether the partners themselves had agreed to consolidate them. But in the latter, where a separate creditor sought proof as a joint creditor, by virtue of an arrangement between the two partners, for the conversion of separate into joint debts, Lord Eldon required evidence of assent by the creditor to such arrangement before the proof could be allowed."

With respect to *Ex parte Clowes*, Mr. Collyer remarks:

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"It is true that in this case no evidence appears to have been given of express consent by the creditors to the arrangement of the partners. But as some years elapsed between the arrangement and the bankruptcy, and as nothing is said which leads to a contrary supposition, the consent of the creditors to the conversion may, perhaps, be presumed. Lord Eldon, speaking of this case, said it turned on peculiar circumstances." (Collyer on Partnership, 771.)

The cases of *Ex parte Williams*, *Ex parte Freeman*, and *Ex parte Fry* are admitted by the learned Vice-Chancellor to be opposed to the view taken by him, and he rests his decision on the supposed authority of *Ex parte Clowes* and *Ex parte Peele*. But we have seen that those cases are not regarded as maintaining the doctrine for which the Vice-Chancellor cites them, while the cases of *Ex parte Williams* and *Ex parte Freeman* have been followed in a large number of subsequent cases, and are accepted as law by Collyer, Story and the other text-writers.

In the case of *In re Wm. Downing*, 3 B. R. 182, also cited by counsel, Mr. J. Dillon undoubtedly expresses the opinion that the creditors may enforce, by bill in equity, a promise given by a continuing partner to whom all the firm property has been transferred, to pay off and discharge the firm's liabilities, and that they may assent to and claim the benefit of this promise at any time before or after the bankruptcy. For this last position no authorities are cited, and the learned judge seems to have mainly rested his opinion on the second position taken by him, viz., that under the bankrupt act, where each of the partners has been separately adjudged bankrupt, and there are no firm assets, the joint creditors may prove against the separate estate of either. "This," observes Mr. J. Dillon, "in effect reaches the result which the English chancellors have felt bound on equitable principles to adopt;" but it may be added that the rule is applied so rigorously that it was held that where a continuing partner received possession of all the partnership property, and continued the business on terms of paying all the firm debts, that the joint creditors could not receive dividends from the separate estate until the separate credi-

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tors were paid in full, although the joint estate amounted to only £13. (*Ex parte Kennedy et al.*, De Gex, Macn. & Gord. Bankruptcy Cases, 100.)

On the whole, I feel bound on the authorities to hold that the separate creditors, not having before the bankruptcy assented to the arrangement between the partners, and not having been, so far as appears, even aware of it, are not entitled to prove their debts against the joint estate.

But while so holding, I am obliged to confess my inability to discover the equitable principle upon which the rule rests.

The reason of the rule is stated by Sir John Leach in *Ex parte Freeman*, as follows:

“I have always considered it to be essential that the bankrupt should be indebted to the party proving at and before the bankruptcy. The engagement of one partner with the other to pay the debts of the firm can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor after the bankruptcy, comes too late, for he is then incapable of contract.”

That the assent of the creditor is necessary to any assignment by which his rights are impaired, is obvious. And if the conversion is claimed to have operated as an extinguishment, or as the substitution of a separate liability for a joint liability, or *vice versa*, it is plain that the creditor must be a partner to the arrangement.

But we have seen that there may be a conversion without an extinguishment; “in which case,” says Story, “the creditors can take advantage of the debts according either to their new or their old form and quality. In other words, they may treat them as joint as well as separate debts, and have their remedy against the joint or separate estate, accordingly, in their election.” (Story on Part., sec. 369.)

As, then, this arrangement in no way impairs the rights of the creditors, but is ordinarily greatly for their benefit, I see not why their assent may not be presumed; as in a

case where property is conveyed in trust for the benefit of a third person, the assent of the party beneficially interested is presumed. It appears now to be admitted that a third party may maintain an action on a promise, not under seal, made to another for his benefit, though he was not cognizant of it when made. (1 Parsons on Con. 467; 2 Greenl. on Ev., sec. 109.)

I am unable to see why a promise made by one partner to another, that he will hold himself jointly liable for the separate debt of the latter, may not, on the same principle, be availed of by the creditor. Why should evidence of the assent of the latter be exacted (and it is admitted that slight evidence will be sufficient, as was the case in *Ex parte Kedie*, 2 D. and C. 32), when that assent would in no case be withheld, as the only effect of the arrangement would be to give to the creditor the security of the firm liability and that of the other partner, in addition to the liability of the partner with whom he had separately contracted. The hardship of the rule is apparent in those cases where the retiring partner transfers the partnership property to the continuing partners, and thus converts it into his separate property. In such cases it is held that after bankruptcy it cannot be treated in marshaling the assets as joint estate or applied to the payment of joint debts. (*Robb v. Mudge*, 14 Gray, 537; *Howe v. Lawrence*, 9 Cush. 553.)

But whatever may be said of the justice of the rule, I consider it too firmly established, for me, at least, to depart from.

In the passage already cited, Mr. J. Story unhesitatingly declares that "to produce any conversion at all, *either with or without extinguishment*, there must be sufficient consideration, and also a deliberate and mutual *assent* of the *creditors and debtors* to such conversion." (Story on Part., sec. 370.)

Of course, after bankruptcy, there can be no mutuality of consent between creditors and debtors, for the latter are incapable of contracting.

If I have ventured to doubt the soundness of the rule thus laid down, it is because it has appeared to me that

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sufficient attention has not been given to the distinction between cases where the creditor is supposed to have relinquished the old liability and accepted a new and substituted liability in its stead, and those where a new and additional liability is created without impairing the old. In the former, his assent is evidently necessary; in the latter, it seems to me it should be presumed, and he should be allowed the advantage of the promise made between third persons for his benefit. And in this view I have at least the countenance of Mr. J. Dillon.

ABNER H. BARKER v. WILLIAM S. LADD ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 7, 1874.

1. CONTINUATION OF ACTION BY ADMINISTRATOR.—The right of an administrator to prosecute an action commenced by the deceased (1 Stat. 8, sec. 31), is upon the condition that the cause of action survives, and that depends upon the local law—in Oregon, upon sections 365 and 366 of the Civil Code.
2. LIMITATION OF SUCH RIGHT.—Section 34 of the Oregon Civil Code, which limits the time to one year, within which the court may allow an action to be continued by the administrator, applies to actions in this court. (17 Stat. 197, sec. 5.)

Before DEADY, District Judge.

ON September 11, 1871, Abner H. Barker commenced an action in this court against William S. Ladd, John C. Ainsworth, Simeon G. Reed and Robert R. Thompson, for the recovery of \$55,860.96 damages, alleged to have been incurred by him in the sale of his stock in the O. S. N. Co. by reason of the misrepresentations of the defendants concerning the same, while acting as directors of said company, and died on March 14, 1872; and on April 6, 1874, Joseph Simon was duly appointed administrator of said Barker's estate.

Upon these facts, on April 16, 1874, said Simon applied for leave to continue the action as administrator of the deceased.

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Opinion of the Court—Deady, J.

Joseph N. Dolph, for the motion.

William Strong, contra.

DEADY, J. This application is opposed by the defendants upon the ground that it was not made within a year from the death of the plaintiff, Barker.

It is admitted that under the law of the State (Or. Code, secs. 365, 366), and section 34 of the judiciary act (1 Stat. 81), that this cause of action survived.

The *right* of an administrator to maintain an action for such a cause is given by the law of the State; and such law, by said section 34, is made "the rule of decision" in this court.

Section 31 of the judiciary act provides that upon the death of a party to an action in the United States courts, before final judgment, "in case the cause of action doth survive," the administrator of such deceased party may prosecute or defend, as the case may be.

Neither this or any other law of the United States declares what causes of action shall survive; therefore, under section 34 aforesaid, the law of the State furnishes the rule on the subject.

Under this section 31 the representative of the deceased party may voluntarily appear and make himself a party to the suit, and if he neglects or refuses to do so, the adverse party may, if he desire it, have a *scire facias* against him to compel him to do so. No time is limited within which these proceedings may take place. But the law of the State (Or. Code, sec. 37) also provides that no action shall abate by the death of a party; and that "in case of the death of a party, the court may at any time *within one year thereafter*, on motion, allow the action to be continued by or against his personal representative."

This provision in relation to the time within which the application must be made, is a rule of practice, and under section 5 of the act of Congress of June 1, 1872, "to further the administration of justice" (17 Stat. 197), governs the practice in this court.

Points decided.

It is clear, then, that this motion comes too late and cannot be allowed. While both the law of the United States and the State authorize the administrator to become a party to the action in place of the deceased party, the law of the State goes farther, and in effect prescribes that this right must be exercised within one year, or else it is taken away or barred. It is a statute of limitations upon the right to maintain or continue this action.

Under a similar provision in the New York Code (sec. 121), *In Matter of Borsdorff*, 17 Abb. P. R. 171, it was held that the motion would not lie after the expiration of a year from the death.

The motion is denied with costs.

THE UNITED STATES v. CARGO OF SUGAR.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

1. ENTRY DEFINED.—The term “entry,” as used in section 1 of the act of March 3, 1863, must be understood to include the series of acts done by the importer at the custom-house necessary to the introduction of his merchandise into the United States, in compliance with the forms of law.
2. FALSE DOCUMENT OR APPLIANCE.—If in the performance of these acts, and as a means of making the entry, the importer is guilty of any false or fraudulent practice or appliance, or uses any false or fraudulent document, he comes within the law.
3. AGENT.—Whether the agent who makes the entry had knowledge of the fraud is immaterial. The guilty knowledge of the owner is sufficient.
4. FRAUDULENT APPLIANCE.—Where charcoal had been mixed with sugar above No. 12 Dutch standard in color, for the purpose of reducing its grade, and making it appear to be below No. 12 Dutch standard in color, and the importer failed to disclose that fact to the custom-house authorities: *Held*, that the color of the sugar was not thereby altered; it was merely disguised, and the concealment and suppression of that fact by the importer at the time of taking his oath and making his entry, and the oath taken by him, constituted “a false and fraudulent practice and appliance” within the meaning of the law; and this notwithstanding that the law does not require that the color of the sugar be stated in the invoice or entry.

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5. COLLECTOR DECEIVED.—Whether the collector was deceived by the attempted fraud, is immaterial.
6. MISTAKE OF LAW.—The belief on the part of the importer that he might lawfully put charcoal into his sugar, and thus alter its grade, and enable himself to lawfully enter them as of a lower grade, and that he might lawfully withhold from the custom-house authorities knowledge of the facts, will be no protection to him.

Before HOFFMAN, District Judge.

Delos Lake, United States Attorney.

Milton Andros, of counsel for U. S.

Doyle & Barber, for claimants.

HOFFMAN, J., charged the jury as follows:

Gentlemen of the Jury: The counsel for the claimants has presented to me instructions, thirty-six in number, with the request that I would give them to you as the law of this case. I have not, according to the State practice, marked upon the margin of each, "granted" or "refused," but they may be all treated as refused, except so far as they are contained in what I am about to say.

I approach, gentlemen, the discharge of my duty in this case with a sense of responsibility, not only because of the importance of the proceeding, but because, in the view I take of it, its determination must depend upon the instructions given to you on the matter of law. I have been unable to discern any matters of fact that are seriously controverted, and upon which you are called upon to pass.

In the first place, I desire to say that whether the law on which this proceeding is based be harsh or just, is no concern of yours, nor is the disposition that is to be made of the proceeds in case of confiscation, or whether the collector or the consul has acted well or ill, or whether the officers have been animated by a rapacious spirit or simply by zeal to detect fraud and to discharge their duties. All these considerations are wholly foreign to the purpose. You are called upon simply to decide whether certain matters of fact to which by law the consequence of forfeiture of the goods is attached, have been established by proof. What, then,

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is the law? The section under which this prosecution is brought provides: "If any owner, consignee or agent of any goods, wares and merchandise shall knowingly make or attempt to make an entry thereof by means of any false invoice, or false certificate of any consul, vice-consul or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such goods, wares or merchandise, or their value shall be forfeited."

You will perceive that the offense to which the penalty of forfeiture is annexed is the making or the attempt to make an entry of goods, wares and merchandise "by means" of any false document, or false practice or appliance.

What, then, is an entry? The term entry in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry; the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction: a series of acts which are necessary to the end to be accomplished, viz., the entering of the goods. In the latter sense it is used in this statute. The language is: "If any owner or consignee shall make or attempt to make an entry by means of false documents, false invoice or any other false or fraudulent appliances." It is the fraudulent use of means in the attaining of an object and accomplishing of a result, to wit, the entry of the goods, which the statute here denounces. The acts which accomplish this result, and which, taken together, constitute an entry, must have a beginning and an end. There is a moment when the entry is attempted to be made or begun; there is a moment when it is accomplished. The entry may be said to be commenced, or attempted, when the merchant presents his declaration or bill of entry. When this bill of entry has gone to the requisite clerks' desks, when accompanied by the certificate of the consul, the invoice and the oath, it is delivered to the collector and accepted by him, then the goods may, in a just sense, be said

to be admitted to entry and the entry to be accomplished. If in the performance of any of those acts, and as a means of making the entry, any false document, appliance or practice is resorted to, then this statute applies and the goods so entered are forfeited to the United States.

Whether, in the course of the proceedings one document is used, or two or three are used, can make no difference. It is also immaterial whether there are one or two bills of entry indicating the dispositions which the importer desires to make of the goods; as of some to the warehouse and some to be withdrawn for consumption, or whether he takes one oath or two oaths. The entry consists of the series of acts required by law to be done to effect that object, and if in the course of them the importer is guilty of any false or fraudulent practice, or uses any false document whatsoever, he comes within the law.

It is urged in this case, on the part of the government, that in making the entry the merchant, in judgment of law, may be said to present himself to the collector with his documents in one hand, and his goods in the other, and if the character of the goods themselves is fraudulently disguised, if any false appliance with respect to them is used, it may justly be said he has effected his entry "by means" of that appliance. I think, gentlemen, it would perhaps be straining the statute to say that any false practice with reference to the goods themselves would be a "means" of making the entry. He does not make his entry "by means" of that false practice or disguise. But he does make his entry "by means" of any false document he may use or any false oath he may take, if such document or oath be requisite and necessary as a means and condition precedent to the goods being admitted to entry. Therefore, if this invoice, the certificate of the consul, or the oath the importer has taken, be false or fraudulent, then he has made use of a fraudulent means necessary to effect the very object he had in view, to wit, the procuring his goods to be admitted to entry.

It is alleged that the oath of Mr. De Ro was false. It is not pretended that Mr. De Ro knew the facts of the case, or was himself, personally, either morally or legally culpable

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in any point of view. But the knowledge of his principal is his knowledge for such purposes, and that it must be so is evident. For otherwise, any fraud could be perpetrated with impunity by procuring an innocent broker or agent, through whom parties not innocent could effect the entry of their goods. It is, therefore, not the innocence or guilty knowledge of the agent, but it is the knowledge of the owner himself who has devised the fraud which carries with it the consequence of condemnation.

Treating, therefore, Mr. De Ro's oath as if it were made by the owner, it is claimed by the prosecution that it is false. He swears, gentlemen, that he has not concealed or suppressed any fact whereby the revenue of the United States might be defrauded.

It is argued, with the ingenuity which has characterized counsel throughout the whole case, that the suppression or concealment of any fact which the law does not call upon him to disclose is not wrongful, and that inasmuch as, in this case, it was not requisite that in the entry, or the invoice, the color of the goods should be stated, the suppression or concealment of the true color could not be an offense. It is true, gentlemen, that the color of the sugars is not required to be stated in the invoice, but from the nature of the oath that is required to be taken it appears to me plain that congress intended by imposing so searching an oath that there should be disclosed at the time, and not suppressed or concealed, any fact, whether required to be stated in the entry or invoice or not, which it was important to the interests of the revenue to be known, or whereby the revenue of the United States might be defrauded. Had it been intended that the importer should merely swear that the invoice, bill of lading and entry were true, the oath would have been to that effect and nothing more. But it goes further. The importer swears "that the invoice and bill of lading now presented by me to the collector of — are the true and only invoice and bill of lading by me received of the goods, etc.; that the entry now delivered by me contains a just and true account of said goods, etc., according to said invoice and bill of lading, and that noth-

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ing has been, on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on said goods," etc.

It appears to me, that when that oath was required by congress it was intended to cover just such a transaction as this, and that though the statements of the invoice might be true, though it might contain all that the law required to be stated therein, yet, if from the nature of the transaction by any fraudulent device or contrivance there was something which, if concealed or suppressed, might tend to defraud the revenue of the United States, it was then to be disclosed, and the suppression of and failure to disclose that fact made the oath to that extent a false oath, thus constituting it a false document and appliance "by means" of which the entry was made.

It has been argued, gentlemen, that it is essential that the collector of the revenue should be deceived. But the effect upon the mind of the collector, of the false or fraudulent appliances, is wholly immaterial; whether or not he believed in the statement, whether he was colluding with the party entering the goods, or knew, in advance, that a fraud was intended or was to be attempted, is wholly immaterial. As well might it be said of one indicted for perjury that the magistrate before whom he had appeared, and before whom he was required to take his oath, did not believe the story or knew he was swearing falsely. Such a defense could not for a moment be admitted, and the case is nearly identical with this. The charge here is, the production or use and employment of a false document or the use of false and fraudulent means to accomplish a certain object. If the party has used those means he is clearly guilty of the offense, whether the collector knew of the commission of the offense at the time it was committed, or only discovered it afterwards. In either event the statute operates, and confiscation follows as a consequence of the employment of the fraudulent means to effect an entry of the goods. Nor does the character of the device, whether flimsy or transparent, or readily or with difficulty to be detected, provided it be

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fraudulent, affect the question. The degree of skill, ingenuity or cunning with which the fraud is contrived, can make no difference. Nor, gentlemen, is it true, as contended, that the forfeiture in such case is limited to the mere goods in relation to which such fraudulent practice is used. The language of the statute is too explicit to admit of any doubt as to its meaning. "If any owner or consignee of any goods, wares and merchandise shall knowingly make, or attempt to make entry thereof by means of any false invoice or fraudulent practice, such goods, wares and merchandise shall be forfeited."

What are the goods, wares and merchandise thus to be forfeited? Plainly, the goods entered or attempted to be entered at the custom-house. There was but one entry, but one invoice in this case. The acts done, taken together, constitute an entry of the goods; an entry of this whole invoice or importation of sugar. If, in the attempt to affect that object, fraudulent means have been used, the goods so entered are forfeited. It is therefore the whole invoice that is forfeited, or nothing.

Having disposed of these matters, we approach, gentlemen, to the more serious part of the case and the real merits of this transaction. It will strike you as curious that the government should affirm that a practice has been resorted to here, which is morally and legally fraudulent, and that this practice or contrivance should be admitted to have been used, and should be defended and justified on legal, and I believe, moral grounds. It is not often that counsel of distinguished ability and high character are so totally at variance upon moral as well as legal questions. It becomes our duty, therefore, to consider what is the true view to be taken of this transaction.

You are aware that congress has established color as a standard of duty, or the standard, rather, whereby to determine the duty upon sugar. It has been stated to you, and the fact is not disputed, that the adoption of this mode of assessing the duties was the result of very many experiments and attempts to establish other rules by which to

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determine the amount of duties to be placed on this species of merchandise.

Mr. Bridge informs us that he thinks this standard is, upon the whole, the best and most satisfactory ever adopted, and such seems to be the fact. What, then, was the motive of congress in adopting the standard of color? It is plain, gentlemen, that except so far as protection is concerned, color could only be rationally adopted as indicative of value—not as invariably indicating it, but as generally doing so, and as affording, upon the whole, the best, most convenient and most appreciable test of the value and the quality of the article. That it is so in this case, has been established by the witnesses; for, though they state that color is not the sole criterion of value, and that there are other considerations of great importance to be borne in mind, yet they all admit that color is a very important circumstance to be regarded in determining the value or quality of sugar. It has been shown that sugar in its pure state is colorless, and it would seem to follow that the degree or depth of the color which a particular article of raw sugar possesses must vary with the amount of impurities it contains; and the amount of impurities contained must have a very important effect on the value of the mass. It is said there can be no such thing as disguise in color; that color addresses itself to the senses, that that which *appears* to be of a certain hue is of that hue; that there is no difference between a real and an apparent color.

The language of the acts of congress in relation to the tariff is used in a commercial and popular sense. It is addressed to practical men of business, and intended to govern them in the daily affairs of life. There is some plausibility undoubtedly in the assertion, that there is no distinction between real and apparent color; that when an object is presented to the eye and produces a certain effect upon the optic nerve, the effect so produced constitutes, to all intents and purposes, its color. But let us consider. It is admitted that if the government were to impose a duty according to the color of a horse, you could not whitewash him and so change his color within the meaning of the law;

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or if congress should impose a high duty upon rosewood logs of a certain color, you could not, by staining their surface, give to the logs a darker or lighter hue in order to evade the duty. To this it has been answered that a horse, or log of rosewood, has a natural color, which may be disguised but cannot be altered. But this admits that there may be an apparent color disguising the true color.

But it is said that sugar has no natural color, but only an artificial color; that its hue is the result of its manufacture; that it depends upon the mode in which the manufacture has been conducted, and upon the ingredients that are put into or removed from the sugar, and therefore it cannot be said to have a natural color like a horse or a log of wood. Let us see. Suppose wines were valued according to their clearness and lightness of color, and suppose there were a drug that would give to the light-colored wine a murky, clouded appearance, without, however, injuring the wine; and that after passing through the custom-house, the wine could be restored to its former clearness by the addition of another ingredient which would precipitate the coloring-matter; could it be said that such a practice would be lawful? Do we not feel that the introduction of the first drug, by which there was imparted to the wine a color different from its real color, would be a fraudulent attempt to disguise and conceal the color of the article. True it is, that it would have to the eye a dark color, but it would not be the color legitimately resulting from the ordinary course of manufacture, to which it has been subjected. I have used this illustration, for the color of wine, like that of sugar, may, in a great degree, depend upon its treatment or mode of manufacture.

What, then, is "color" in regard to sugar, as the term is used in the statute? It appears to me, gentlemen, that it is the hue or degree of lightness which the sugar has attained in the ordinary course of its manufacture, and which indicates the degree of perfection to which the process of clarification has been carried. Undoubtedly while the sugar, or while the cane-juice rather, remains in the manufacturer's hands, he may omit to take out the impuri-

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ties, or may put in impurities if he so desires, for as yet it has not become sugar. The hue of the sugar—that is, the result of his operations will—be determined by the degree to which he has abstracted the impurities or foreign substances from it, or the amount of such foreign substances as he may have introduced into it. But when it has passed out of his hands and gone into the hands of the importer, or the proposed importer, or the merchant, then the hue it has acquired is the “color” that congress had reference to when it established color as the standard of classification. If, then, by the admixture of some foreign and totally different substance, such as caramel, or, as in this case, charcoal, this color be changed, the color so acquired cannot be considered the color to which congress referred as a standard for assessing the duties. It is contended here that the color has been really altered, not disguised; that the mass is of a color below No. 12 Dutch standard of color; that is, that the sugar really possesses the color which you see in that bottle. Is this strictly true? I observe that the lumps of any considerable size, upon being crushed, reveal the color of the sugar as it was before the admixture, and that, in fact, there was only a slight coating of charcoal upon the surface of the lumps, the sugar itself being entirely unaltered; that is, the sugar in the interior of the lumps. Can it make any difference whether the lumps are small or large? The eye perceives in the larger lumps that the charcoal only covers the surface, and that the mass of the sugar in the interior of the lump is unchanged and is of the original color. If our vision were more perfect we would perceive the same phenomenon in the small microscopic particles. It appears to me, under such circumstances, that the color of the sugar cannot, in any sense, be said to have been changed, but rather that it has been disguised.

One other observation will, I think, expose the true nature of this transaction. I am not aware that the obligations of citizens to the government are less solemn or less imperative than those of one citizen to another. Suppose, gentlemen, that a contract had been made and the money

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paid down, by which one of you agreed to deliver sugar above No. 12 Dutch standard in color, and suppose that, as has been proved here, it were possible to impart to sugar of a dark hue a lighter appearance by putting into it gypsum or chalk, or some other coloring-matter: your contract in the case supposed would (like the obligation of the importer to pay so much to the government, in case his goods are above No. 12 Dutch standard) be to give to the purchaser sugar above No. 12 Dutch standard in color. In both cases the same mode of classification is referred to. In both cases the same phrase is used to indicate the kind of sugar that is the subject-matter of the obligation. The obligation is, in the one case, to pay the duty specified in the act, if the sugar be of a certain color; in the other, to deliver, for a price already paid, sugar of a certain specified color. Would you conceive yourselves at liberty to take sugars of No. 6 in color, and put into them gypsum or chalk, and tender them to the party with whom you had contracted, as sugars above No. 12? Would you expect him to listen to you, if you should say, "I contracted to give you sugar above No. 12 Dutch standard in color; but what is the Dutch standard of color? You can only know by looking at it through a glass bottle. You can go to the appraiser's office and compare the sugar I offer with sugar above No. 12 Dutch standard, and if the colors are the same I claim the right to tender it, notwithstanding it is in fact No. 6 sugar, and I have used chalk or gypsum to make it appear of a lighter color." Can any man mistake as to the propriety of such a course? It appears to me that there is no difference between the two cases, and the device by which a seller would give a false appearance of lightness is of the same character, and must have the same legal effect, as the device by which the importer would give to these sugars a false appearance of darkness.

If that view be correct, then, gentlemen, in this case the importer, consignee or agent, has mixed charcoal with these sugars in order to disguise the true color, and make them appear to be below No. 12 Dutch standard in color, when in point of fact they were above No. 12 in color, with

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intent to pass them at the custom-house as sugars of the lower grade; and if he has suppressed and concealed from the officers of the customs the fact that he has tampered with and sought to disguise the color of his goods, then, in my judgment, he has been guilty of a false appliance and fraudulent practice within the meaning of the statute, and must abide the consequences which the law imposes.

It may appear to some of you, gentlemen, that there has been but an innocent mistake as to the law—a false construction given to the statute. That for this mistake the confiscation of the goods is too severe a penalty, especially as the consequences of that confiscation fall, in great part, upon innocent parties, and to a considerable extent upon the representatives of a gentleman, now deceased, well known for his public spirit, his great mental activity and varied attainments. But you are not at liberty to be influenced by these considerations. Mr. Gordon's ignorance of, or mistake as to the law, cannot excuse him. He did this act at his peril; and if the act be an offense under the statute, the penalty of the law attaches. I will read to you in this connection, from the same authority which one of the counsel has cited, and then shall conclude my remarks.

In the case which I am about to read, congress had enacted that where refined sugars were exported, a drawback or return of duty might be claimed. The law further provided that if any goods should be entered by means of any *false denomination*, they should be forfeited, unless it were shown that such false denomination happened by accident or mistake, and not from any intention to defraud the revenue. The party in this case entered the goods as 'refined sugars,' and claimed the drawback. They were, on the part of the government, alleged to be not refined sugars, but what are called "bastard sugars," and were seized as having been entered under a false denomination. The first point to be decided was whether the sugars were or were not refined sugars. The court held they were not. The claimant then urged that he thought they were, and that he had merely made a mistake in the construction of the law. The question thus arose whether this was such a mistake as

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brought him within the proviso of the statute exempting the goods from confiscation when the false denomination was shown to be the result of mistake or accident.

Now, upon this state of facts, which I hope you will bear in mind, as it closely resembles the state of the facts with which we have to deal, Judge Thompson, one of the most eminent judges that ever sat upon the bench of the Supreme Court of the United States, says: "The first inquiry which seems naturally to arise is, What is the nature and character of the mistake which will save the forfeiture? Is it restricted to some matter of fact, or does it include mistake as to the application of the law to the subject thus falsely denominated, the qualities of such sugars being fully known to the person making the entry? I cannot think that, upon any sound construction, the proviso can cover mistakes of the latter description.

"Such are purely mistakes of law, and it is a principle too well settled to admit of being drawn in question, that ignorance or mistake of law furnishes no excuse in any case, civil or criminal. * * *. And if the term 'mistake' does not include error of judgment as to matter of law (as I think it does not), I am unable to discover any ground upon which the false denomination can be said to have happened by mistake or accident; and the only remaining question is, whether this was done with an intention to defraud the revenue, within the sense and meaning of the proviso; and it appears to me that it follows as a matter of course that if the entry was by design, and not by mistake or accident, the legal consequence is that it was done to defraud the revenue. * * *

"Admitting that he himself honestly believed that his sugars were refined sugars, within the meaning of the law, and that he was entitled to the drawback, still it amounts to no more than a mistake or error of judgment upon the law, and does not protect the sugars from forfeiture."

If that be the law, gentlemen, and I see no reason to doubt it, for the same principle is affirmed in a case decided by the late judge of the southern district of New York, then the circumstance that the owner of these goods believed

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hat he might lawfully put charcoal into them and lawfully withhold the knowledge of that fact from the custom-house authorities, and that he thereby and within the meaning of the law degraded the sugars and lowered their color, and converted them from sugars above No. 12 to sugars below No. 12 in color, and that he might lawfully enter them as of the lower grade—though he honestly believe all this, such erroneous belief and mistaken construction of the law afford him no excuse, and the goods are subject to forfeiture.

If, therefore, in conclusion, gentlemen, you believe from the evidence that this sugar, after it reached the purchaser's hands, was mixed with charcoal for the purpose of reducing its grade and making it appear to be below No. 12 Dutch standard in color, when in point of fact before the introduction of such charcoal it was above No. 12 Dutch standard in color, and if you believe that Mr. De Ro, when he took his oath and made the entry, suppressed and concealed that fact, or did not disclose it to the custom-house officer, then that suppression and concealment, and the oath so taken by Mr. De Ro, were, in my judgment, a false appliance and practice within the meaning of the law, of which the consequence is a forfeiture of the goods contained in the invoice.

UNITED STATES v. JOHN JACKSON.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

1. CHINAMEN—CIVIL RIGHTS—INDICTMENT.—Where the indictment avowed that one Ah Koo was deprived of a right secured to him by the sixteenth section of the act of congress of May 31, 1870, in this, that there was exacted from him the sum of four dollars, by the defendant, who was then and there collector of taxes in Trinity county, under color of a certain law of the State of California, which this indictment particularly sets forth, but the indictment contained no averment that Ah Koo was a foreign miner and within the provisions of the State law: *Held*, bad on demurrer.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

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Latimer, U. S. Attorney, and W. H. L. Barnes, for the United States.

Jo Hamilton, Attorney-General of California, J. D. Hambleton and George Gordon, for defendant.

By the Court, HOFFMAN, J. The questions raised by the demurrer are two: First, as to the sufficiency of the indictment; and second, as to the constitutionality of the act of congress under which it is based.

The indictment avers, in substance, that one Ah Koo was deprived of a right secured to him by the sixteenth section of an act of congress of 1870 in this, that there was exacted from him four dollars by the defendant, who was then and there a duly elected collector of taxes in Trinity county, under color of a certain law of the State of California, which the indictment particularly sets forth.

The indictment contains no averment that Ah Koo was a foreign miner, and within the provisions of the State law. If this averment be unnecessary, no proof of that fact need be given on the trial, and the act of congress would then be held to apply to a case of illegal extortion by a tax collector from any person, though such exaction might be wholly unauthorized by the law under which the officer pretended to act.

We are satisfied that it was not the design of congress to prevent or to punish such abuse of authority by State officers. The object of the act was, not to prevent illegal exactions, but to forbid the execution of State laws, which, by the act itself, are made void. The district attorney, himself, seems to recognize the necessity of showing that the tax was levied by the officer under the authority of State law; for he avers him to have been duly elected tax collector. Nor does he contend that if any other person, not a tax collector, had levied a similar contribution from a Chinaman, the offense would come within the provisions of the act of congress.

It would seem, necessarily, to follow, that the person *from whom the tax was exacted* must have been a person from

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whom, under the provisions of the State law, the officer was authorized to exact it. The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions of the State law, the exaction cannot be said to have been made "under color of law," any more than a similar exaction from a Chinese miner, made by a person wholly unauthorized, and under the pretense of being a tax collector.

Again: The constitutionality of the section of the act of congress in question must be sustained, if at all, under the second clause of the fourteenth amendment, which provides that no State shall deny to any person the equal protection of the laws; for the first clause relates exclusively to the privileges and immunities of citizens of the United States. If, therefore, the person on whom this tax was levied was not a foreign miner and not subject to the tax, by the terms of the State law, he has the same remedy for the illegal extortion as would be possessed by any citizen. He has, therefore, equally with any other citizen, the protection of the law. It is only when, being a foreign miner, a tax is levied upon him as such, which tax white citizens are not subjected to, that he could be said to be deprived of the equal protection of the law.

We are, therefore, of opinion that the indictment should contain an averment that he was a foreign miner, with such other averments as are necessary to bring him within the operation of the State law, and subject him to its provisions.

The demurrer, on this point, is sustained.

On the second point it is also contended the sixteenth and seventeenth sections of the act of 1870 are unconstitutional and in excess of the powers conferred upon congress by the fourteenth amendment.

The duty of declaring an act of congress void, for unconstitutionality, is one of the most delicate and responsible which the courts are called upon to discharge. It is only in the clearest cases, and in those admitting of no other

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decision, the Supreme Court of the United States has declared laws of congress to be unconstitutional. It is said by Mr. Justice Swayne, in a recent case, that only three instances of the kind occurred since the organization of the government. In some of the States the subordinate courts decline to pass upon the constitutionality of State laws under State constitutions, but remit the question to the highest judicial tribunal for its determination.

We see no reason why the same rule should not be observed by the subordinate tribunals of the United States courts.

It is further to be considered that the law in question was passed almost immediately after the adoption of the amendment, and, in the supposed exercise of the powers conferred by it, by a congress to a very large extent composed of the men who had framed the amendment, submitted it to the States, and urged its adoption. A law passed by them, in pursuance of the power conferred by the amendment, may, therefore, be regarded as a legislative construction and interpretation of its provisions; and such contemporaneous legislative interpretations have been always considered to afford much light as to the intention of the fathers in framing the original Constitution, and as guides to courts in the interpretations of its provisions.

For these reasons, even if our opinion were less clear as to the constitutionality of this law, we should feel it our duty to sustain the law, and to remit the question to the Supreme Court for final determination.

ROBERT S. BARTLETT ET AL. v. HENRY ROGERS ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 8, 1874.

1. WILL—FOREIGN PROBATE.—The probate of a will and issue of letters testamentary in the State of New York, do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the State of California.

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2. **OBJECTION—WHEN TAKEN.**—The objection may be taken at the hearing, where it does not appear on the face of the complaint where letters are issued, and issue has been joined on the allegation of the complaint that letters testamentary have been duly issued to the plaintiffs.
3. **LIMITATION—NOTE PAYABLE ON DEMAND.**—A note payable on demand, whether with or without interest, is immediately due. An action may be maintained upon such a note without previous demand, and the statute of limitations begins to run from its date.
4. **SAME.**—But if there be any exception in the case of a note bearing interest, a note which does not *in terms* call for interest, is not within the exception.
5. **ACCORD AND SATISFACTION.**—Where a debtor transfers specific property to trustees for the use of his creditors, under a mutual agreement signed by the creditors, whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction.
6. **SAME.**—Such accord and satisfaction held good as against the indorsee of a promissory note payable on demand, given by the debtor to one of the parties to said agreement, who held no other demand against the debtor, where it did not appear that the transfer of said note was made before the date of said accord and satisfaction.

Before SAWYER, Circuit Judge.

Earl Bartlett, for plaintiffs.

Campbell, Fox & Campbell, for defendants.

SAWYER, Circuit Judge. The will of Bartlett was admitted to probate, and letters testamentary thereunder issued to plaintiffs by the surrogate's court in the county of Broome, State of New York. The will has never been admitted to probate, nor have letters testamentary ever been issued to plaintiffs in the State of California. It is well settled that the probate of a will and the issue of letters testamentary in one State, do not authorize the executors so appointed to maintain an action as such in another State. (*Doolittle v. Lewis*, 7 John. Ch. 46; *Morrill v. Dickey*, 1 John. Ch. 156; *Williams v. Stoors*, 6 John. Ch. 352; *Brown v. Brown*, 1 Barb. Ch. 195; *Vroom v. Van Horne*, 10 Paige, 536; *Miller v. Thompson*, 1 Clif. 127; *Caldwell v. Harding*, 5 Blatch. 501; *Kerr v. Moon*, 9 Wheat. 566; *Armstrong v. Lear*, 12 Wheat. 169; *Vaughan v. Northrup*, 15 Pet. 1.) It is claimed, however, that the objection ought to have been raised by de-

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murrer, and if not so taken, should have been set up specially in the answer, and the objection not having been so taken, it is waived. But it does not appear on the face of the complaint that the will was proved, and the letters issued by a foreign court, or that there had been no probate of the will in the courts of California. The objection seems to go rather to the *title* of the plaintiffs to the debt sued on, than to their *capacity to sue*. (*Kerr v. Moon*, 9 Wheat. 572.) But however that may be, the complaint is either wholly bad, as not stating facts sufficient to constitute a cause of action in their favor, or else the allegation "that said will was duly probated and letters testamentary duly issued to said plaintiffs upon said estate of said Bartlett," is a sufficient allegation that the letters were issued by the proper court to enable the plaintiffs to maintain their action, in the absence of an objection by special demurrer specifically pointing out the defect. In the former case, the objection may be taken at any time under section 434 of the California Code of Procedure. In the latter, issue is taken upon the allegation itself in the answer, and on that issue it is necessary for plaintiffs to show that they were duly appointed by a court competent to confer authority to maintain the action. In *Armstrong v. Lear*, 12 Wheat. 169, the authenticity of the will was admitted, and the question of its effect submitted apparently without objection, yet the court refused to permit the action to be maintained. So in *Doolittle v. Lewis*, 7 John. Ch. 50, the court recognize the propriety of taking the objection "*at the hearing*," and in *Kerr v. Moon*, 9 Wheat. 566, the objection was taken for the first time at the argument on appeal, although the defect appeared on the face of the bill, and it was argued by the respondent that the objection came too late. But the Supreme Court held otherwise, and reversed the decree. (*Id.* 570-72.) I think this point well taken by objection made to the introduction of the record when offered in evidence, under the issue raised by the answer.

The objection that the action is barred by the statute of limitations is clearly fatal.

The due bill sued on was executed more than twelve years

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before the death of Tompkins, and Tompkins had been in the State continuously, twelve years after its execution, and before his death.

The statute of California provides that all actions founded upon written instruments shall be barred in four years, and on those executed out of the State in two years. That a note or bill payable on demand, whether with or without interest, is due immediately; that an action may be brought on it as soon as it is made, without previous demand; and that the statute of limitations begins to run from its date, is the law of the State of New York, where the instrument in question was made as settled by its highest courts, there can be no doubt. (*Wheeler v. Warner*, 47 N. Y. 520; *Herrick v. Wolverton*, 41 N. Y. 581; *Howland v. Edmunds*, 24 N. Y. 308.) The law as settled in California is the same. (*Brumagin v. Tallant*, 29 Cal. 506; *Bell v. Sackett*, 38 Cal. 409; *Ziel v. Dukes*, 12 Cal. 482.) The statute begins to run as soon as the action accrues. If, then, an action can be maintained upon a note payable on demand, as soon as made, without a previous demand, the right of action must necessarily have accrued at that time, and the statute commences to run at the same point of time. But the note in suit does not purport by its terms to bear interest, and is, therefore, not on its face within the exception relied on, if any such there were. The claim is therefore barred, and the executors were forbidden by the statute to allow it. (Code Civ. Proc. 1499.)

I also think the accord and satisfaction shown, is a good defense to the action. Certain property was delivered to trustees in satisfaction of the debts due the various creditors of Tompkins, upon a mutual written agreement among the creditors to receive the property as such and discharge Tompkins. Among the creditors executing the agreement was Denton, the payee of the due bill sued on. Plaintiff's theory, however, is, that the money on the instrument in suit was not due till actual demand was made, and that Denton could not make an agreement for accord and satisfaction, so as to bind a holder who received it before due, without notice. But, as we have seen, the instrument was

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due immediately on its execution, and it does not appear when it came to the possession of Bartlett. It is only alleged that it came to the possession of Bartlett during his lifetime, and this may have been more than ten years after it became due. There was no other debt due from Tompkins to Denton, and there is nothing to show, either in the averments of the complaint, or in the evidence, that Bartlett received the note before the accord and satisfaction.

If I am right upon either of the points discussed, there must be judgment for the defendants, and I think them entitled to judgment on all.

Let judgment be entered for defendants with costs.

THEODORE LE ROY v. JOHN CARROLL ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 19, 1874.

1. MEXICAN GRANT—LIMITATION.—The statute of limitations of California does not begin to run against a confirmed Mexican grant, finally located under the act of congress of 1860 (12 Stat. 34), until the patent issues.

Before SAWYER, Circuit Judge.

The facts sufficiently appear in the opinion of the court.

Wm. Mathews, for plaintiff.

Wm. H. Patterson, for defendants.

SAWYER, Circuit Judge. Action to recover a tract of land within the charter lines of the city of San Francisco, as established by the act of incorporation of 1851. The plaintiff relies on a patent of the United States issued upon a confirmed Mexican grant. The defendants and their grantors have been in possession since January 1, 1855, claiming title by possession under the Van Ness ordinance, the act of the legislature confirming the same, and the act of congress of 1864, ratifying said title under said ordinance and

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act of the legislature; and they rely upon said possession and acts, and the statute of limitations. The only question is, when did the statute of limitations begin to run under plaintiff's title? The plaintiff's grant was located under the act of June 14, 1860, and the location became final by publication under that act as early as September, 1861; but the patent did not issue till June 1, 1870. This action was commenced May 5, 1873, within five years after the issue of the patent, but more than ten years after the location became final. If, then, the statute began to run from the date of the final location, or from the passage of the statute of limitations of 1863, the action is barred. But if it did not begin to run till the date of the patent, the action is not barred. By the terms of the statute of limitations of 1863, the action is barred, for under its provisions it began to run without regard to the final confirmation of the grant; but in *Montgomery v. Bevens*, 1 Sawyer, 681, Mr. Justice Field held that, it was incompetent for the legislature of California to pass an act that would cut off the right of action to recover lands under a confirmed Mexican grant after final confirmation, by a statute of limitations commencing to run before the title was finally perfected under the acts of congress relating to the subject—that as against a perfected title under such grant, the "statute of limitations can only begin to run from the date of the consummation of the title;" and this principle was affirmed by the Supreme Court at the last term in *Henshaw v. Bissell*, 18 Wall. 255. But the question still remains, what constitutes such a "consummation of the title" as will set the statute in motion?

The fifth section of the act of 1860 (12 Stat. 34), under which the grant in question was located, provides that "the plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

It is insisted that, under this provision, the title is perfect from the date when the location becomes final; that the grant has then been irrevocably attached to a specific tract of land; that the decree and record of the proceedings

finally locating the land is complete record evidence of a perfect title to the specific tract embraced in the location equal in dignity and effect with the patent; that a patent is unnecessary, and only affords another form of record evidence of no greater efficacy; that its issue is a mere ministerial act, which may be performed, or omitted, without prejudice to the right or title of the confirmer; that every essential act has been performed by the government in thus perfecting the right of the confirmer, and furnishing record evidence of his right; that the confirmer under the act has a legal title upon which ejectment or any other action may be maintained; that if a patent was before necessary to perfect the confirmer's right, it is now perfected by the final location under the further act of 1860, or else the latter act has not the same effect and validity in law as if a patent had issued; that if a patent would otherwise convey the legal estate, the same is accomplished by the final location under this act, and, if a patent would set the statute of limitations in motion, then it is set in motion by such final location, or else the final location under the act does not have the same effect and validity in law as if a patent had been issued; and which the statutes say it shall have. In short, that, whatever be the effect and operation of the patent, the final location under the act of 1860, by the express terms of that act, has the same operation and effect as the patent itself; that the Supreme Court of California has given full effect to this provision of the act of congress in *Seale v. Ford*, 29 Cal. 106; *O'Connell v. Dougherty*, 32 Cal. 462; and has held the location under said act to be the final confirmation of the grant. (*Mahoney v. Van Winkle*, 33 Cal. 448; *Hubbard v. Smith*, not yet reported; *Bissell v. Henshaw*, 1 Sawyer, 560.) Such is briefly the argument of defendants, and to my mind it appears unanswerable. I adopted this view on a former occasion; and if there were nothing else, I should adhere to it now. But the learned justice of the Supreme Court assigned to the circuit, in a case arising under the Sutter grant, recently tried, expressed a different opinion, and held that the title was not so far perfected as to set the statute in motion until the patent issued.

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Since that time, the case of *Henshaw v. Bissell* has been decided by the Supreme Court of the United States, in which the same learned justice delivered the opinion, and, although he does not use the term patent in determining the point of time at which the statute begins to run, but says that the "statute can only begin to run against the title perfected under legislation of congress, from the date of its consummation," I have no doubt, from the general language of the decision, and the previous rulings of the learned justice, that he means by the term, the "date of its consummation," the date of the patent. It is said that in that case the action was not barred in any view, whether the date of the passage of the statute of limitations, the date when the location became final, or the date of the patent, be taken as the point of time, when the statute begins to run, and that the language of the opinion is, therefore, only a dictum of the judge. The fact that the court discussed and decided the point under the circumstances of the case, and the well-known circumstances connected with the question, in this State, satisfies me, that it was intended to deliberately consider and decide the point. I shall, therefore, regard the point as settled by the Supreme Court. If it is to be reconsidered, and, with deference, I think it worthy a reconsideration, I shall leave the task to that tribunal, where it properly belongs. It follows from this view that the action is not barred, and that there must be judgment for the plaintiff with costs, and it is so ordered.

FISHER v. CRAIG.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JULY 20, 1874.

1. INFRINGEMENT OF COMBINATION.—Where the patent is for a combination of several distinct parts, a machine not embracing all the parts that go to make up the combination, does not infringe the patent.
2. ANTICIPATION.—Where there are two patented machines for hydraulic mining, each having a supply-pipe and a discharge-pipe coupled by a horizontal swivel-joint in combination with a nozzle connected by a joint

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which enables the operator to elevate or depress the nozzle, and the claim is for a combination of these several parts for the accomplishment of the same object, the prior machine will be an anticipation of the later, although the joint in the latter is a semi-universal or knuckle metallic joint, while that in the former is made of india-rubber or other flexible material.

3. SAME—MECHANICAL SUBSTITUTE.—The metallic joint in the later machine being old, and it having been long in use for the purposes required in the machine in question, it is but a known mechanical substitute in the combination for the flexible joint in the prior machine, and, for the purposes of the combination, must be regarded as the same thing as the joint in the earlier combination.

Before SAWYER, Circuit Judge.

Bill in equity to restrain the infringement of a patent. The complainant obtained a patent for an "improvement in Hydraulic Mining Apparatus," No. 110,222, dated December 20, 1870, upon which there was a reissue, No. 5193, dated December 17, 1872. In his specifications he says: "My invention relates to an improved construction and arrangement of that class of hydraulic pipes and nozzles which are used for directing and delivering a stream or column of water against a bank in hydraulic mining. My improvement consists in such an arrangement of the pipe and nozzle that the nozzle can have both horizontal and vertical play, through the medium of two moving water-tight joints, for the purpose of facing it to any desired point of the compass, without shutting off the water or stopping the work of the machine." Again: "Heretofore this class of machines has been made with single joints, so that the discharge-pipe will command only the half of a circle; but by using the two joints I can swivel the nozzle around to any point of the compass, and then command the same amount of circle with the nozzle as the ordinary ball-and-socket joint." After describing his invention he states his second claim as follows: "What I claim, and desire to secure by letters-patent, is * * * 2. The two curved sections, A, B, connected by a horizontal swivel-joint, in combination with a nozzle connected by a semi-universal joint, constructed and arranged substantially as set forth." If there was any infringement it was of this combination. The de-

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endants, as one defense, set up a prior patent to one Allenwood, which had before been assigned to defendants and was then owned by them, and claimed that, as to the points covered by the claim in complainant's patent, it was an anticipation of complainant's invention. Allenwood's patent was for "an improved method of constructing the apparatus for hydraulic operations in mining, washing gold-bearing dirt," etc., being No. 43,468, dated July 12, 1864, upon which there was also a reissue, No. 5255, dated January 28, 1873. The third claim is as follows: "3. The combination of the two working-joints or couplings, D and R, with the discharge-pipe N, and a supply-pipe, A, by means of which both the horizontal and vertical motions are obtained, substantially as and for the purposes set forth." The two curved sections A and B in complainant's machine had two corresponding parts, the supply-pipe A, and curved section C. in Allenwood's machine, and those parts in both machines were connected by a swivel-joint. They both had a nozzle connected to the corresponding parts in the two machines by joints which enabled the operator to elevate or depress the nozzle at will, while the corresponding horizontal joints in the two machines enabled him to describe an arc of a circle in a horizontal direction; but the complainant's joint coupling the nozzle to the pipe was a metallic semi-universal or knuckle-joint, while the corresponding joint in the Allenwood machine was a flexible joint of india-rubber, gutta-percha, or other flexible material. Both were used in the same relative position, to accomplish the same purpose in the same way—by elevating and depressing the nozzle. No further statement can be given that would be useful, without copies of the drawings attached to the specifications of the respective patents.

Benj. Morgan, for complainant.

M. A. Wheaton, for defendant.

SAWYER, Circuit Judge. This is a bill in equity to restrain the infringement of a patent. There has been much discussion on both sides, which, when we come to examine the case

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closely, seems to be irrelevant to the issues. The main question really is, as to whether the plaintiff's patent in certain particulars is patentable, or whether it has been anticipated by prior inventions. It is not always a question of which is the better machine that arises in a case for the infringement of a patent. The question, as in this case, often is, whether the part of the machine which is claimed to be infringed, as in the specifications claimed and as patented, is patentable.

Now, in order to ascertain that fact, it is necessary to scrutinize the patent, scrutinize the claim, and see what it is that is claimed and patented; because the party is confined to the claim he has made, and the patent which is granted.

A general, cursory view of a whole machine affords very little aid in cases of this kind.

In the case of the Fisher patent, what are the claims made, and what are the points covered by the patent? Is there an infringement upon any of those points? Is the patentee the first inventor as to those particulars which he claims?

The patent sued upon is a reissue. There was a patent at first issued in which there was but one claim presented, and that claim is, substantially, the first in the reissued patent. The reissued patent covers three claims. The plaintiff must have had a patentable improvement in each one of those three particulars in order to be entitled to protection, as to each, and there must have been an infringement of one or the other, or all of those particulars, to entitle him to relief in this case. His first claim, which is substantially the same as in his first patent, is "the swivel-joint, nozzle and pipes, A, B, D, E, combined, as described, with the lever F working through slotted posts *f*, strap *i*, lever *c*, and pawl and ratchet *j*, *k*, for the purpose specified." The first claim is a combination of all these elements, these various parts working together in that form. There can be no pretense that there is any infringement of that claim, because there is not a combination of all of those parts found anywhere in the defendant's machine. And there must be the use of the entire combination, a combination of all the parts, in order to constitute an infringement. That this is the settled law, there can be no doubt. (*Carter v. Baker*, 1

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Sawyer, 512; *Coolidge v. McCone*, 2 Id. 571, and cases cited; *Gould v. Rees*, 15 Wall. 194.) Now, all of these parts combined together are not found in the defendant's machine. Several of them are entirely omitted. There can be no pretense, therefore, that this claim is infringed, and I am not aware that it is so contended by complainant's counsel. In fact, counsel have not been very specific in pointing out in their briefs or in the oral argument, the precise claims the infringement of which they suppose has been established.

At the argument, I desired counsel to point out the specific claim infringed, and in what particulars they claimed that there had been an infringement. The argument has been very general on that side, and confined generally to the machine as a whole. I am not aware that they insist that this specific claim has been infringed. If they do, it is certainly very clear that such claim is without foundation.

The third claim is, "The levers C and F, in combination with section B and nozzle E, substantially as set forth." I am not aware that that particular claim is supposed to be infringed. It certainly is not, because that combination is not found in the defendant's machine, and it is a claim for a combination, and the combination is not there. There can be no possible pretense, therefore, that that claim is infringed. That disposes of two out of the three claims. There are but three in this patent. There was but one in the original patent, the first claim in the reissue being substantially the same as that in the original patent, and in the new or reissued patent the additional claims have been added.

Then, if there is any infringement at all, it must be of the second claim, and that claim is, "The two curved sections A, B, connected by a horizontal swivel-joint, in combination with a nozzle, connected by a semi-universal joint, constructed and arranged substantially as set forth." That, then, is the combination. If there be any infringement of the patent, it is the infringement of that claim, and it is only necessary to examine that claim for the purpose of determining whether there is any feature of the machine covered by the claim that is properly patented,

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in view of all the facts, and whether there has been an infringement of that feature of the machine.

It is not claimed that this ball-and-socket joint in defendant's machine, or this knuckle or semi-cylindrical joint in complainant's, or that this swivel-joint in both, is new [illustrating by the models]. It is not claimed that any one of these parts is new. The claim is, that this *combination* is new. If the combination which is embraced in this claim is not new, then the complainant is not entitled to a patent for that feature of the machine.

The defendants have set up in their answer that there has been an anticipation of this part of the plaintiff's machine, and among others, that the Allenwood machine is an anticipation. I would say, with reference to this joint in defendant's machine [showing], that it appears from the evidence to have been frequently used, prior to the issue of complainant's patent. This, in complainant's machine, is not a ball-and-socket joint. It is frequently called a knuckle-joint, and a semi-cylindrical joint: that is, instead of a ball and socket there is a section of a cylinder. A ball-and-socket joint has been frequently used in hydraulic mining machines. There are several prior patents in which it will be found. So the swivel-joints have been used in various forms before; that is manifest.

But this is not a claim for the use of any one of those alone, but for the combination. It is claimed that this Allenwood's machine is an anticipation of this particular combination. It is not claimed that it is in the same form precisely. Now, in this Allenwood machine is found this section here which corresponds to that section in complainant's machine; what Mr. Fisher calls the curved section A. That curved section is found in the Allenwood machine. This is the curved section B, as Mr. Fisher calls it in his machine, and this curved section, corresponding to curved section B, is found in this Allenwood machine.

The swivel-joint is here in Fisher's machine; the swivel-joint is here in the Allenwood, a prior machine. There are those three parts, then, which enter into Mr. Fisher's combination, found in this Allenwood machine [showing].

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There is the nozzle in complainant's machine, and here is the nozzle in the other machine. *There* is a joint in the one, and *here* is a corresponding joint in the other machine, connecting the nozzle with the other parts of the machine; of course a different kind of joint, nevertheless a flexible joint. This nozzle, with this section coupled with some flexible material, such as india-rubber or canvas, or some such flexible substance which joins the two together, and which forms a joint so that the pipe with the nozzle can be operated vertically by elevating or depressing it.

This [showing] is called the Allenwood machine. It is prior in point of time, and it is owned by the defendants. Now, the Allenwood patent has four different claims, and it is an anticipation of the other in several particulars. First, there is "the combination of a discharge-pipe, provided with guides or diaphragms, and the elbow C, connected by a working-joint with the supply-pipe A, substantially as and for the purposes above specified." The second claim in the Allenwood patent is "the combination of two elbows, C and A, with the swiveling joint D." That, then, is precisely the same as the sections A and B in combination with the swivel-joint, in complainant's patent, and this combination is found in both machines; and if this combination described in Allenwood's second claim was patentable, that same combination in complainant's later machine, of course, must be an infringement upon it. Those are both swivel-joints, although of different construction. The third claim in the Allenwood is "the combination of the two working-joints, or couplings, D and R, with the discharge-pipe N, and supply-pipe A, by means of which both horizontal and vertical motions are obtained, substantially as and for the purposes specified." Then fourthly, he claims the combinations of all the parts constituting a new and improved machine.

Conceding this [showing], in the Allenwood machine to be a joint, it is only a different one from this in the Fisher machine; and Allenwood's third claim covers precisely the same parts and same combination of parts as are covered by Fisher's second claim, the only difference

being in the material and the construction of the joints. This I will show by reading from the specifications in Mr. Fisher's patent:

"My improvement consists in such an arrangement of the pipe and nozzle that the nozzle can have both horizontal and vertical play through the medium of two moving water-tight joints, for the purpose of facing it to any desired point of the compass, without shutting off the water or stopping the work of the machine." That is precisely what this Allenwood machine does. It has two working-joints, one by which you obtain this horizontal motion, and the other a perpendicular or vertical motion. Now, Mr. Fisher says: "Heretofore this class of machines has been made with single joints, so that the discharge pipe will command only the half of a circle, but by using the two joints I can swivel the nozzle around to any point of the compass, and then command the same amount of circle with the nozzle as the *ordinary ball-and-socket joint*." He thus recognizes the fact that the ordinary ball-and-socket joint was in use for that purpose. By using this swivel-joint in combination with the curved sections, A, B [showing], he can get the horizontal motion, and by the other joint he can command the same arc of the circle vertically that he could with the ordinary *ball-and-socket joint*. Then he says: "I am aware that a discharge nozzle has been heretofore used by Jenkins W. Richards, of Michigan Bluffs, California, in which two joints were made for the purpose of throwing the stream in a circle, but his nozzle proved to be a failure when subjected to the practical test of hydraulic mining."

There is, then, this other machine (Richards), prior also in date to his, but the joints in that are both swivel-joints, and that, the testimony tended to show, did not prove a success; but I read this claim here to show what his idea is, with a view to explaining his combination. That before that time machines were made with one joint, so that the discharge-pipe would command only half of a circle in one direction, but by using two joints he could "swivel the nozzle round to any point of the compass, and

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then command the same amount of circle with the nozzle as the ordinary ball-and-socket joint." Then in view of that, his second claim comes in: "The two curved sections, A, B,"—here they are in these two (Allenwood's and Fisher's) machines,—“connected by a horizontal swivel-joint, in combination with a nozzle;”—there [showing] they are in both machines—so far they are identical;—“connected by a semi-universal joint,” which is there [showing]; this in the Allenwood [showing], is a joint also, which is in the same relative position and answers the same purpose;—“constructed and arranged substantially as set forth.” Now, then, all the elements,—these two sections, and these two joints, and the pipe,—are the same in both; all of those are combined in the two machines. They are arranged together relatively, in precisely the same places, and for the accomplishment of the same purposes, in substantially the same mode. This joint in Fisher's machine [showing] is simply a known mechanical substitute for that one in the Allenwood machine. It may be a better joint, and this doubtless is a better machine, and possibly in that respect may be patentable. I am not prepared, and it is not necessary now, to say whether it is or not; but you have all of the elements in the two machines, and combined in the same way and for the same purpose, and the latter must, in this combination, be an infringement of the first; and if there is anything patentable in this (Fisher's machine) that does not exist in this (Allenwood's) in that combination, it is in the *construction* of this joint; because this [showing Fisher's] is a differently constructed joint from that (Allenwood's); that, if anything, is the only patentable thing in it. If you leave out of Fisher's claim the words “constructed and”—you have the same thing in both machines substantially: “The two curved sections, A, B, connected by a horizontal swivel-joint, in combination with a nozzle, connected by a semi-universal joint, arranged substantially as set forth.” *The construction of the joint is not claimed.*

Now, the idea expressed in Fisher's claim is to make a combination of the *two* joints *instead of one*, with the supply pipe and the nozzle, and that is precisely the same as the idea ex-

pressed in Allenwood's third claim, and found embodied in his machine, and if there is any difference between the two claims, it is only in the mode of construction and in the material of the joints. But the idea of both claims is to have these five elements or parts combined. This machine, claimed to be an infringement [referring to defendants], has substantially the same combination of similar parts as the other two complainant's and Allenwood's [showing]. Here is the section which corresponds to this, and this to this. Here is the joint which corresponds to these two joints in the Fisher and Allenwood machines. Here is this part which corresponds to this portion. Here is a ball-and-socket joint instead of the semi-cylinder joint in complainant's machine, or instead of the flexible joint in Allenwood's. Now, then, if there is anything in Fisher's combination which is entitled to a patent over that (Allenwood's), it is because Fisher has substituted a better joint before known. It depends merely upon a different construction and material. In other words, a known mechanical substitute has been used in his machine in the place of one of the parts in Allenwood's, which performs the service better. But when we come to that, the *defendants also* constructed this joint [showing the infringing machine] differently from that of either Fisher's or Allenwood's. So that we have the same elements, the same parts and things combined, and the only difference is in the form or construction of one of the common parts used in the combination.

This, in the complainant's machine is a plain known mechanical substitute for that in the Allenwood machine, that is all, though it is differently constructed. If there is anything in that claim that can be patented, it is the form or construction of the joint, and this, defendant's joint [showing], does not contain that form or construction, but is only another well-known mechanical substitute for Allenwood's joint—a different known substitute for the same thing from that employed by complainant. It seems clear to me, when we come to analyze and compare the claims of the patents relative to these several machines, that the idea of the combination of the two last, complainant's and de-

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fendant's, is embraced in the prior one of Allenwood; and if there is any difference, it is in the form and construction of this joint; and if that is patentable, it is not embraced in the defendant's [the infringing] machine, because this is in a different form, differently constructed. In that respect, both of these joints in complainant's and defendant's machines are really but substitutes for this in Allenwood's. Defendant's is but a different known substitute from complainant's for that in Allenwood's machine. This, in defendant's, may be better or worse than that in complainant's, but it is only another known substitute for the same part, in Allenwood's machine. There may be an infringement by either upon that of Allenwood, and still be a better machine, or it may be a worse machine. It may be conceded, for the purpose of this decision, that Fisher used the same combination as Allenwood, and that it may yet have a patentable element in it; but if there is a patentable element in this combination, it is in the form and construction, by substituting a better known joint than this one of Allenwood's; but if so, that particular construction is not found in the defendant's implement. The Allenwood patent is owned by defendants, and is the first machine embracing the combination of the several parts. This, then, in my judgment, is a protection to the defendants in their use of this combination, in the form adopted by them.

My conclusion is, that the second claim in complainant's patent is the combination of these five elements, before mentioned, and that this combination is substantially in the Allenwood machine, the Fisher machine, and the Craig machine. Those five elements are in all, this Allenwood's being an anticipation of the complainant's machine. The latter in this particular is not a different machine, unless that difference consists in the construction of one of these parts. The patentability of it, if any exists, consists in that change in the construction of that joint. If that construction is the only thing patented, then this joint in defendant's machine has a different construction, although this joint is a known substitute for those in both the other machines [showing].

Points decided.

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My judgment is that this Allenwood's invention is an anticipation of this machine, so far as this combination and claim is concerned, other than the form of construction, and protects the defendants in the use of this, which is of a different construction. If I am right in this, and that is the conclusion I have reached, after careful and thorough investigation of this case, there must be a decree for the defendants.

Those other combinations, covered by Fisher's patent, may still make the plaintiff's a valuable invention, and it may be patentable in those particulars; but I do not think the defendant's machine an infringement of any patentable portion of that machine that is covered by any claim in the patent and specifications.

Decree for defendants, with costs.

THE HERMINE.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 18, 1874.

1. DESCRIPTION OF VOYAGE.—Under the merchant shipping act of England of 1873, the shipping articles need only specify the maximum duration of the engagement of a seaman, and the places or parts of the world to which it does not extend: *Held*, that a specification of the places to which the voyage or engagement might extend, was an implied agreement that it was not to extend to any other, and therefore a sufficient compliance with the act.
2. SUIT FOR WAGES AGAINST FOREIGN SHIP.—A Court of Admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master.
3. SAME SUBJECT.—*Seemle*, that the court will not decline jurisdiction where it appears the seamen have been discharged with their own consent before the expiration of the voyage, without the payment of wages already earned, or any agreement or understanding concerning them.
4. DESERTION.—A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not, and therefore where seamen leave a vessel before the completion

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of the voyage, although with the knowledge of the master, and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion.

5. **CONTRACTS WITH SEAMEN.**—Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside or disregarded by Courts of Admiralty if inequitable.
6. **QUANTUM MERUIT.**—*Quantum meruit*, what seaman entitled to on.

Before DEADY, District Judge.

The facts appear in the opinion of the court.

Addison C. Gibbs and *Ellis Hughes*, for libellants.

William H. Effinger, for claimants.

DEADY, J. Peter Whelan and five others bring this suit against the British bark *Hermine* to recover the sum of \$489.98 alleged to be due them as wages for services as seamen on said bark, on a voyage from Liverpool to this port.

The libellants shipped on the *Hermine* at Liverpool on January 21, 1874, as ordinary seamen, "on a voyage from Liverpool to Portland (Oregon), and any ports and places in the Pacific, Indian and Atlantic oceans, China and Eastern seas; thence to a port for orders and the continent of Europe (if required), and back to a final port of discharge in the United Kingdom: term not to exceed three years;" at the monthly wages of 3 pounds 5 shillings.

It is alleged in the libel, that the libellants, during the voyage, were "fed upon very poor food, of such poor quality as to endanger their health and render them liable to scurvy and other sickness," and that therefore they asked for their discharge at this port, "unless they could be better treated and fed," and that thereupon the master discharged them, but refused to pay them their wages.

The answer of the claimants, G. H. Fletcher & Co., of Liverpool, denies that the libellants were poorly fed or otherwise improperly treated on the voyage, or that they left the vessel on that account, or that the master discharged them; and avers that the libellants deserted the vessel and thereby forfeited their wages.

The *Hermine* arrived at this port on August 5, and a few

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days afterwards the libellants asked the master—Alfred H. Hiscock—for their discharge. He replied that he was willing to discharge them if they would forfeit the wages earned, as he would have to pay double or more wages for seamen in this port, to take their place. Roberts wanted \$15 but finally agreed to take \$5. Rogers agreed to the same terms; and the others said they would forfeit their wages if the master would give them a legal discharge.

On the following day, Monday, August 10, the libellants, by the direction of the master, met him at the British consul's office. The matter was then stated to the consul, who declined to discharge the men unless they were paid in full. This the master declined to do, and the consul directed the men to return on board. Some conversation then ensued between the master and the men, the latter being still anxious to leave the vessel, the result of which was, that the former promised if the libellants left, he would not arrest them. Thereupon the libellants returned to the vessel, and after some hours the master followed. The result was that the master paid the men from \$3 to \$4 apiece, except Roberts, to whom he paid \$8, when they took their effects and quietly went ashore on the same day. In addition to these sums they had each received a month's wages in advance, and \$6 from the slop-chest on the voyage.

The master did not expressly assent to the libellants' quitting the ship, but he had good reason to believe they would do so, and took no means to prevent it. In fact, the money paid libellants was given to and received by them with the tacit understanding that if they were allowed to clear out without being troubled or arrested, they would make no further claim against the vessel.

The libellants had no cause to complain of their treatment on the voyage. On the trial they testified that the beef and bread were bad, but the weight of evidence is that both were as good as is usually furnished at the port of Liverpool. They were otherwise very well supplied and cared for, and were in good health during the whole of the long voyage. Neither did they complain of bad food or ill treatment of any kind to the British consul, although they had

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ample opportunity to do so, if they desired; nor did they leave the vessel on that account, but so far as appears, for the purpose of bettering their condition in a pecuniary point of view. The wages out of this port average \$40 per month—more than twice the rate at which they were engaged to serve on board the *Hermine* for the next two and a half years.

It is admitted that the answer correctly describes the voyage set out in the shipping articles, but the libellants maintain that the description of the voyage beyond this port is so vague and uncertain as to render the contract so far void, and therefore the libellants are entitled to their discharge and wages here, as being the legal end of the voyage.

The contract having been made in a British port for service on a British vessel, its validity must depend upon the law of that country. This is the general rule of law, and it is particularly applicable to cases like this in the admiralty courts, which “are in some sense international courts charged with the duty of declaring the law applicable to ships.” (*The Acme*, 2 Ben. 386; *The Jerusalem*, 2 Gal. 198; *The Infanta*, 1 Abb. Ad. R. 267.)

Section 149 of the English merchant shipping act, 1854, provides that the shipping articles shall, among other things, contain the following: “The nature and, as far as practicable, the duration of the intended voyage or engagement.”

The merchant shipping act, 1873, amends this section, so that the agreement, “instead of stating the nature and duration of the intended voyage or engagement,” may “state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is *not* to extend.”

No English authorities have been cited upon the construction of this provision, but I think that under the act of 1873, if not the one of 1854, the description of the voyage is sufficient. The maximum duration of the engagement is fixed at three years, and although the articles do not expressly “state the places, or parts of the world” to which it is *not* to extend, I think they do so sufficiently when they

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mention "the places, etc.," to which it *may* extend. By a necessary implication all other "places or parts of the world" than those mentioned are excluded from the engagement—it does not extend to them.

Upon this point counsel for libellants cite *Snow v. Wope*, 2 Curtis, 301, in which the agreement was held void, because the articles only described the voyage as being "from the port of Boston to Valparaiso, and other ports in the Pacific ocean, at and from thence home, direct, or *via* ports in the East Indies or Europe," without any limitation upon the time to be occupied in making such voyage. The court held that the agreement was void because it did not comply with the act which required that the agreement should declare "the voyage or voyages, term or terms of time," for which the seamen may have shipped. But in the case at bar, the duration of the engagement is limited, and it is to be inferred from the opinion of the court in *Snow v. Wope*, that if there had been a like limitation in that case the court would have held the agreement valid notwithstanding no definite or specific voyage was described in it.

On the part of the claimant it is objected that this being a suit for wages earned by foreign seamen on board a foreign vessel, the court ought to decline the jurisdiction and remit the libellants to the tribunals of their own country. Upon this point counsel cites: *The Napoleon*, Ole. 208; *Graham v. Hoskins*, Id. 224; *Davis v. Leslie*, 1 Abb. 131; *The Infanta*, Id. 268; *Bucket v. Klorkegeter*, Id. 405.

The rule established by these cases is to the effect that the court will not take jurisdiction in such cases unless it is necessary to prevent a failure of justice, as where the voyage has been completed or abandoned, or the seamen discharged, or the contract otherwise dissolved by the wrongful act of the owner or master.

These cases were all decided in the same court, and they carry the rule against the jurisdiction to the extreme. In considering this question, in Ben. Ad. section 282, it is said that "nothing within the territory of a nation is without the jurisdiction. * * In the present state of international intercourse and commerce, all persons, in time of peace,

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have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty." In *The Jerusalem*, 2 Gal. 198, Mr. Justice Story states the rule as follows: "Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent in which foreign courts have sustained the claim for mariner's wages."

In any view of the matter, this appears to be a proper case for exercising the jurisdiction. The libellants allege that they were discharged by the master in this port without the payment of wages. If the libel be true the voyage is terminated as to them by the wrongful act of the master. Under such circumstances it would be mere mockery and a denial of justice to remit the libellants to the forums of Great Britain, for, being discharged in this port, they are practically denied the means of access to such forums. Indeed, I think the court ought not to decline the jurisdiction, even if it appeared that the libellants were discharged with their own consent without the payment of wages or any agreement or understanding upon the subject, or upon terms that are manifestly inequitable and unjust. In such case they ought to recover as upon a *quantum meruit*. Being separated from the vessel with the consent of the master, if they are not allowed to enforce any claim which they may have against her, in this court, it is a practical denial of justice.

But upon the facts of the case the libellants appear to have been guilty of desertion. They cannot complain that the master was aware of their intention to quit the ship and took no means to prevent it or to compel their return after they had left. That is a matter between him and his owners. He may have had good reason to believe, as he stated in his

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testimony, that they would leave the ship in spite of him, and that it was no use to try to prevent it. That they shipped with the intention of making their way to this coast and then deserting the vessel.

However this may be, the libellants were bound by their contract with the owners to stay by the ship until the completion of the voyage, unless they were actually discharged by the master, or so mistreated as to justify their leaving without his consent. They had no right to leave the ship simply because they could do so, or because the master assured them that he would not trouble them for it if they did. Even if it could be said that the master connived at their quitting the ship, their act was none the less desertion. In so doing they willfully violated their contract with the owners, and they cannot now evade responsibility therefor, by showing that the master was aware of their intention, and took no means to prevent it.

Of course, the master is the agent of the owners, and if it appears that by any artifice or representation he had induced the libellants to quit the vessel under an impression that they had a right to do so, the case would be altered.

But I do not think there is any ground for supposing that the master desired to get rid of these men without paying them their wages. No motive is shown for any such conduct, and so far as appears, the vessel can gain nothing by their leaving, even without their pay. But with the libellants the case is otherwise. They evidently acted upon the fact that they could command more than double the wages, in or out of this port, they were receiving on the *Hermine*. The pretense that the food was substantially bad, or that they were otherwise ill-treated, is evidently an after-thought. If the food was bad they could and should have complained to their consul, especially when they were before him on this very subject of being discharged.

But supposing it to be true that the libellants not only left the vessel with the *knowledge* of the master, but also with his *consent*, still I do not think they are entitled to recover.

In the first place, upon this theory of the case all the cir-

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cumstances attending the payments made them before leaving, go to prove that such payments were made and received in satisfaction of any claim the libellants might have against the ship for their services. It was competent for them to agree with the master to quit the vessel, and receive so much for their services. True, a court of admiralty, in the interest of the seamen, will look into such contracts and dealings, and if any substantial advantage has been taken of them, so far disregard them, and do justice in the premises.

In the second place, if the libellants were discharged without any understanding or agreement as to the payment of wages, then they ought to recover such sum, if any, as under all the circumstances they are equitably entitled to—as upon a *quantum meruit*. Under the circumstances what are their services worth to the vessel? Allowing the monthly rate of wages mentioned in the articles, according to the libel there is due the libellants about eighty-one dollars a piece at this port. To supply their places from here to Liverpool, allowing four months for the voyage, at forty dollars per month, will cost one hundred and sixty dollars per man. The difference between that and the price the libellants agreed to perform the same services for is ninety dollars per man—more than the sum claimed by the libellants. It follows that the libellants, having failed to perform their contract, are not equitably entitled to anything, because all the circumstances considered, their services are not worth so much to the vessel as they have received for them.

And this is so upon the supposition most favorable to the libellants—that the *Hermine* will return to Liverpool direct; for, by the terms of their contract, they might be required to serve two and a half years before being discharged, and to supply their places during all this time at the enhanced wages of this port, or the other seas mentioned in the articles, would add very much to the loss sustained by the vessel.

Let the libel be dismissed, and a decree entered for the claimants for costs.

IN RE THE ST. HELEN MILL CO.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 29, 1874.

1. SEAL.—A corporation cannot execute a deed otherwise than under its seal.
2. MORTGAGE—HOW CREATED.—A lien by way of mortgage can only be created by a deed under seal.
3. ASSIGNEE REPRESENTS THE CREDITORS. — An assignee represents the rights of the creditors and each of them, as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which, on grounds of public policy or otherwise, he would not be allowed to.
4. DEED OF CORPORATION. — A corporation cannot make a deed unless the directors, or a majority of them, meet together as a board, and so determine; and the only evidence of such meeting and action is the "record" required to be kept by the secretary.
5. STOCKHOLDERS' MEETING.—A stockholders' meeting has no authority to elect a president and secretary of the corporation.
6. SAME—NOTICE OF.—Meeting of stockholders without notice is invalid.

Before DEADY, District Judge.

OBJECTION to proof of debt *with security*.*Joseph Simon and John W. Whalley, for the assignee.**William Strong, for the creditor.*

DEADY, J. On February 21, 1874, the St. Helen Mill Co., a corporation duly organized under the laws of this State, with a board of five directors, and doing business at St. Helen, was duly adjudged a bankrupt, and thereafter H. S. Allen was appointed assignee of its estate.

On March 27, 1874, S. A. Miles made proof of a debt against the estate of the bankrupt of \$3714.28, arising upon the promissory note of the corporation, made under its corporate seal to the order of said Miles, on January 7, 1873, for the sum of \$3239.38, payable one day after date, with interest at the rate of one per centum per month, *with security*—the security being, as claimed, a mortgage executed

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by said corporation upon certain lots in the town of St. Helen.

To this proof of debt *with security*, the assignee made objection: 1. That said pretended mortgage was not executed or acknowledged by the bankrupt. 2. That said pretended mortgage was not executed by the authority of said bankrupt.

The answer to the objections is irrelevant and immaterial.

The facts of the case, as found by the register, are substantially as follows: A few days after the making of the note—which was given in settlement of a previous indebtedness—the creditor asked the directors of the incorporation, or some of them, for security, at the same time giving them to understand that if the debt was secured he would not sue upon it at the following April term of court. The result was, that after some informal conversation between the four persons then acting as directors of the corporation, it was concluded between them that the security should be given, and thereupon an instrument purporting to be a mortgage by the St. Helen Mill Company of certain lots in St. Helen, belonging to it, was executed to the creditor, as follows: “In witness whereof, the said party of the first part has hereunto set their hands and seals the day and year first above written.

“ST. HELEN MILL CO.

“WM. PICKERING, [L.S.]

“Secretary.

“JAMES DART, [L.S.]

“President.”

Said Dart and Pickering being two of the directors aforesaid, and acting president and secretary of the corporation; and on the same day said Dart and Pickering acknowledged said instrument “to be their free act and deed,” before the county clerk of Columbia county.

At the date of signing this instrument, and for some years previous, said corporation had a corporate seal, and never had adopted or used any other seal upon that or any other occasion, and that said corporate seal was not affixed to said instrument aforesaid; nor did said directors, at any formal

meeting, ever consider or authorize the execution of said instrument, or the giving of any security to said Miles whatever.

The capital stock of said corporation consisted of 500 shares, and at the annual meeting of stockholders for the election of directors thereof, on January 6, 1873, there was only 406 shares of said stock represented; and no notice of said meeting was given.

Upon this state of facts the question arises: Is this instrument the deed of the corporation? for if it is not its deed, it is not a mortgage, and is therefore no security for the debt in question. It was an established principle of the common law, that corporations aggregate could only act under their common seal. (1 Black. Com. 475; *Kinzie v. Chicago*, 3 Ill. 108.) In this country the rule has been much modified, but I know of no case which goes so far as to hold that a corporation can execute a deed otherwise than under its corporate seal. The exceptions to the common law rule are confined to cases of simple contracts, or contracts not under seal. A conveyance of real property by a corporation must be under its corporate seal. (*Richardson v. Scott R. W. & M. Co.*, 22 Cal. 156.)

In Angell and Ames on Corporations, sec. 295, it is said: "To bind a corporation by a specialty it is necessary that its corporate seal should be affixed to the instrument. * * * The corporate seal is the only organ by which a body politic can oblige itself by deed; and though its agents affix their *private* seals to a contract binding upon it, yet these not being *seals*, as regards the corporation, it is in such case bound only by simple contract."

In *Eagle W. M. Co. v. Monteith*, 2 Or. 285, the Supreme Court held "that the deed of a corporation must be sealed with the corporate seal."

Indeed, counsel for the creditor practically admits that this instrument is not the deed of the corporation, and therefore not a legal mortgage, but insists that it is an equitable one, and therefore entitled to be recognized and enforced in a court of bankruptcy as a security in favor of a creditor.

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Where a deed or agreement of sale, absolute upon its face, was intended by the parties as a mortgage or security only, equity will treat it and give effect to it, as such. Such an instrument is sometimes called an equitable mortgage, because equity treats it as a mortgage. (1 Wash. R. 502, 504, 507.)

But in this case, the instrument which the court is asked to treat as a mortgage is in no sense the deed of the bankrupt. "It is impossible to create a lien by way of mortgage, by any instrument which is not a deed under seal. An instrument not thus executed would not be a mortgage, though it might be a contract for a mortgage." (1 Wash. R. 504.) But if it be admitted that this instrument as between the parties to it, would be enforced in a court of equity as an agreement for a mortgage, still it does not follow that such effect can be given to it in this proceeding or in any proceeding between the parties now before the court.

"An agreement to mortgage an estate as a security for a debt, though regarded in some cases as an equitable mortgage, can have no validity against third persons who acquire legal interest in or liens upon the property. * * * Equity may, in some instances, reform an instrument, but it cannot make one." (1 Wash. R. 514.)

Now, since the date of this instrument the property mentioned therein has passed to the assignee. Upon the assignment he took the property in trust for the creditors, to apply the same upon their several claims as they then existed, with or without security. The assignee not only succeeds to the rights and liabilities of the bankrupt, but he also represents the rights of the creditors and each of them; and as such representative, may maintain or defend proceedings in regard to the property of the bankrupt, which, on grounds of public policy or otherwise, the latter would not be allowed to. (*Carr v. Hilton*, 2 Story, 231; *Brock v. Terril*, 2 N. B. R. 745; *In re Wynne*, 4 N. B. R. 6; *Allen v. Massey*, Id. 76.)

But this instrument is not even the contract of the corporation, and therefore equity would not treat it as an agreement for a mortgage. Upon the facts, it is plain that the

corporation not only did not give the creditor a mortgage, but it never agreed to do so. The corporation act provides that "the powers vested in the corporation are exercised by the directors." (Or. Code, 661.) But to act, they or a majority of them must meet together as a board, and that fact, together with their conclusion, must appear from the "record of the official business" of the corporation, which section 9 of the corporation act requires to be kept by the secretary. (*Gashwiler v. Willis*, 33 Cal. 16; *The California*, 1 Sawyer, 597; *D'Arcy v. T. K. H. & C. Railway Co.*, 2 Exch. 158.)

In this case, the record not only fails to show that at any meeting of the directors it was resolved or voted to give the creditor a mortgage or security for his debt, but the testimony of the directors who signed this instrument, affirmatively proves that it was only signed by them in pursuance of an informal understanding among the majority of the directors, and that the subject never came before the directors as a board, or was acted upon by them at any meeting of the same.

Besides, the directors who signed this instrument as "Pres." and "Sec." were never duly chosen. It appears from the record that the stockholders present at the annual meeting in 1873, after the election of directors, proceeded to elect a president and secretary of the corporation. This was an unauthorized act and void. A stockholders' meeting has no power to elect a president or secretary. The authority to do this is vested in the directors "at the first meeting" after their election and qualification. (Or. Code, 661; *Gashwiler v. Willis*, supra.) Indeed, the stockholders' meeting at which these directors were elected was illegal, being held without notice, and less than the whole amount of stock represented.

The objections to the proof of debt, *with security*, are sustained at the costs of the creditor.

Affirmed on petition for review in the Circuit Court, August 19, 1875. Mr. Justice FIELD, delivering the opinion of the court, said:

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Points decided.

Since the demurrer to the petition in this case was argued, I have carefully read the opinion of the district judge upon the questions presented, and I concur fully in its reasoning and conclusions. It presents with clearness and precision the law as to the necessity of a corporation attaching its seal to an instrument to render it operative as its deed; and holds, in accordance with the uniform current of the authorities, that the power to execute a mortgage by its officers can only be conferred by vote of the directors meeting together and acting as a board; and that the only evidence of such vote is to be found in the official record of the corporation. Upon these points I could add nothing to the opinion.

PHILIP G. GALPIN v. LUCY B. PAGE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 31, 1874.

1. UNITED STATES COURTS—STATE LAWS.—The courts of the United States are not bound by the decisions of the State courts upon questions of general law. It is only decisions upon local questions which are peculiar to a State, or adjudications upon the meaning of the constitution or statutes of a State, which the courts of the United States adopt as rules for their judgments.
2. RELATION OF NATIONAL COURTS TO STATE COURTS.—Whilst the courts of the United States are not foreign courts in their relation to the State courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them. In all cases the jurisdiction of a State court may be inquired into when its judgment is made the foundation of a claim in the Circuit Court, but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.
3. PRESUMPTIONS IN FAVOR OF JUDGMENTS.—There is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised.
4. PERSONAL JUDGMENTS ON SERVICE BY PUBLICATION.—There can be no personal judgment upon constructive or substituted service by pub-

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lication against a non-resident of a State, except as a means of reaching property situated at the time within the State, or of affecting some interest therein, or determining the *status* of the plaintiff with respect to the non-resident party.

5. SERVICE BY PUBLICATION.—When constructive or substituted service by publication in a personal action is authorized by statute in place of personal citation, the statute must be strictly pursued.
6. HAHN v. KELLY DISAPPROVED.—The case of *Hahn v. Kelly*, decided by the supreme court of California, examined and disapproved.
7. SUITS IN REM—INFANTS.—Classification of suits *in rem*, and service of process upon infants of tender years, considered.

Before Mr. Justice FIELD.

This was an action to recover possession of a lot situated within the city of San Francisco, and was tried by the court before Mr. Justice Field, without the intervention of a jury. The court found the following facts and conclusions of law:

A jury having been waived by a stipulation of the parties in writing, duly filed, and the cause having been tried by the court without a jury, after hearing the testimony and argument of counsel, the court being sufficiently advised, finds the following facts and conclusions of law, viz.:

First. On the fifteenth of July, A.D. 1853, Franklin C. Gray died in the city of New York, intestate, and seised and possessed at the time of his death of the premises in controversy.

Second. Said Franklin C. Gray left surviving him his widow, Matilda C. Gray. In December, 1853, said Matilda C. Gray gave birth to Franklina C. Gray, who was the lawful issue of said Franklin C. Gray; and under the statutes of California the said Matilda C. Gray and said Franklina C. Gray inherited the premises in controversy as heirs-at-law of said Franklin C. Gray, in the proportion of one-half thereof to each.

Third. At the time of the death of said Franklin C. Gray, and since then to the present time, said Matilda C. Gray, and since her birth, the said Franklina C. Gray, have both been citizens and residents of the State of New York, and neither of them was in the State of California in the years 1853, 1854, 1855, or 1856, and at the commencement of this

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suit, and ever since, the defendants have been citizens and residents of the State of California, and the plaintiff has been a citizen and resident of the State of New York.

Fourth. At the commencement of this suit, and on the first day of April, 1868, plaintiff was, and he now is, the owner in fee of the premises in controversy, through proper mesne conveyances and proceedings in the Probate Court of the city and county of San Francisco, State of California, from said Matilda C. Gray and Franklina C. Gray, except in so far as the right, title, and interest of either of them of and to said premises were divested from them by virtue of a sale made by James D. Thornton, commissioner, on the third day of May, 1856, under a decree of the Fourth Judicial District Court of the State of California, hereinafter-mentioned, at which sale Gwyn Page became the purchaser of the premises in controversy, and a deed thereof was executed to him by said commissioner, under said decree, on the twenty-third day of May, 1856; and thereafter the interest of said Page in one-half of the premises sued for passed by proper conveyances from him to Joseph B. Crockett, and from him to defendant, Lucy B. Page, June 20, 1863, and the interest of said Page in the other half of the premises passed under his will to, and is now vested in, the defendant, Lucy B. Page.

Fifth. The plaintiff demanded possession of the premises of defendants before the commencement of this suit, and was refused by defendants; and defendant, Lucy B. Page, was in possession when demand was made and suit brought.

Sixth. The value of the demanded premises, which constitute water lot number seven hundred and fifty-nine, as designated on the map of the city of San Francisco, is ten thousand dollars. From six to eight months prior to the commencement of the suit, the lot in question was covered with the waters of the bay of San Francisco of considerable depth, and not in a condition to use. About eight months prior to the commencement of the suit, the defendant, Lucy B. Page, commenced filling the lot, and continued to fill it till it was completed—about the time of the commencement of this suit. It was filled with solid earth and thereby reclaimed

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from the sea, and made fit for use and put in a condition to rent, and the expense of such filling was paid by the defendant Lucy B. Page. Prior to the said filling and reclamation from the sea, the monthly value of the rents and profits of the premises was nothing. Subsequent to said filling and reclamation, that is to say, since the time of the commencement of this suit, April 17, 1868, the value of the rents and profits has been thirty dollars per month.

Seventh. The filling in of said lot for the purpose of reclaiming it from the sea and rendering it fit for use, is a permanent and valuable improvement, and the value of such improvement is fourteen hundred and ninety dollars. The said defendant, Lucy B. Page, has also paid street assessments assessed upon said lot to the amount of three hundred and seventy-five dollars and twenty-five cents; and the said street improvement is a permanent improvement, beneficial to said lot. Said defendant has also paid taxes, State, city and county taxes, on said lot, to the amount of five hundred and seventy-one dollars.

Eighth. That on or about the twenty-third day of January, 1854, Jos. C. Palmer and Cornelius J. Eaton, then residents of the city of San Francisco, were appointed administrators of the estate of Franklin C. Gray, deceased, by the Probate Court of the city and county of San Francisco, and thereafter duly entered upon the duties of their trust as such administrators.

Ninth. That subsequently, in February, 1854, William H. Gray, a brother of the decedent, brought a suit in equity in the Fourth District Court of the said State against said administrators, said Matilda C. Gray, and one James Gray, and subsequently the complainant added Franklina C. Gray as a party defendant. The bill in the suit alleged that a copartnership had existed between the complainant and decedent since 1848, and that it embraced all their business operations and all their purchases of real property, although the titles were taken in the individual name of the deceased, and that the interest of the complainant extended to one-third of all acquisitions of every kind and description of both copartners. The object of the suit was to settle up

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the affairs of the alleged copartnership and to obtain a decree for the one-third claimed by the complainant.

Tenth. That in January, 1855, said Cornelius J. Eaton, who had been a clerk of the deceased, resigned his trust as administrator, as aforesaid, and brought suit in equity in the same District Court against Palmer, the remaining administrator, and against the widow Matilda C. Gray, and the infant Franklina C. Gray. The bill in this suit alleged that a similar partnership, from January, 1851, had existed between himself and the deceased, embracing all the real and personal property of both, and all their business, and that his interests in the partnership extended to one-fourth of the property possessed at the time, and of all future acquisitions. The object of the suit was to settle up the affairs of the alleged partnership, and to obtain a decree adjudging to the complainant one-fourth of the estate claimed.

Eleventh. That on the twenty-third day of October, 1855, upon the stipulation of the guardian *ad litem*, who had previously been appointed for the infant, and the attorney for the other parties who had appeared, the two actions were consolidated into one, and that four days thereafter a decree was entered in the action thus consolidated. Appended to this decree is the following statement, signed by the district judge.

"When the above decree was signed, it was stated to me in court, by the attorneys or some of them, that the above decree was by the consent and agreement of all the parties thereto. I think Governor Foote and Gwyn Page, Esq., were present when the statement was made.

"JOHN S. HAGER,

District Judge."

"November 29, 1857.

By the decree it was adjudged that a partnership had existed between Eaton and the deceased which embraced all the property, real and personal, and all the business of both; that this partnership commenced in 1851, and that in it Eaton had an interest of one-fourth; that a similar partnership had co-existed between William H. Gray and the deceased, in which William H. Gray had an interest of one-third; that

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this latter partnership was subject to the partnership of Eaton, and that he should first take one-fourth of the property, and Gray one-third of the remaining three-fourths, and that the other two-fourths should be equally divided between the widow and the child. And by the decree James D. Thornton was appointed a commissioner to take and state an account of the business, profits and property of the two copartnerships, to make report thereof to the court, and, upon confirmation of the sale, to execute proper conveyances to the purchasers. On the first day of March, 1856, the said commissioner made his report of the accounts taken, showing that the deceased was largely indebted to each of his alleged copartners. By a decree of the court made on the seventh day of April, 1856, the report of the commissioner was confirmed, and a sale of the entire property, real and personal, of the alleged copartnership was ordered. The property was accordingly sold by the commissioner at public auction, and Gwyn Page purchased, as above-mentioned, and received from the commissioner a deed for the same.

Twelfth. That neither in the suit of William H. Gray, nor in the suit of Cornelius J. Eaton, above set forth in findings eighth and ninth, was there any personal service of original process on the infant Franklina C. Gray, nor did she ever appear in either of said actions; that an attempt was made in both actions to obtain service on the infant by a publication of the summons in a newspaper; that there was no affidavit made in either case as a basis for an order of publication, and in the action of Eaton against Palmer and others there was no order of publication. Afterwards a guardian *ad litem* was appointed for the infant in each action upon petition of the claimants therein. The other defendants in the two actions, except defendant James Gray, appeared by attorney, and answered the bills of complaint filed against them. The defendant, James Gray, was never served with process nor appeared in the action in which he was named as defendant.

Thirteenth. That in the fall of 1857, the widow Matilda C. Gray and the child Franklina C. Gray, took an appeal to

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the Supreme Court of the State of California, from the decree in the action consolidated as aforesaid, and thereafter, in April, 1858, the decree was reversed on the ground that no sufficient service of summons was made upon the infant Franklina, under the statute, in the case of Eaton against Palmer, and that until such service no guardian *ad litem* could be appointed for her; and on the further ground that the evidence presented had not established a copartnership between William H. Gray and the deceased, and the cause remanded to the District Court for further proceedings.

Fourteenth. That after the cause was remitted to the District Court, that court ordered, after hearing counsel for the respective parties, a new trial of all the issues as to all the parties; and upon this order the same remained on the calendar for trial until April, 1861, when the District Court entered judgment for the defendants therein, dismissing the two suits consolidated as aforesaid for want of prosecution.

Fifteenth. That Gwyn Page, the purchaser of the premises in controversy at the commissioner's sale, was the attorney-at-law of William H. Gray, the plaintiff in one of the suits consolidated, and J. B. Crockett was his law partner, and the conveyance of the latter, of his interest to the defendant Page, was made after the reversal of the decree in the consolidated suit.

Sixteenth. That the action against the defendant, J. B. Crockett, was dismissed previous to the former trial, by consent of parties, and the action thereafter proceeded against the defendant Lucy B. Page alone.

And as conclusions of law from the above facts, the court finds:

1st. That the proceedings in the two suits of Gray and Eaton, and the decree rendered in the consolidated action, were void as to the infant Franklina C. Gray, for want of due and sufficient service of original process upon her; and that the ruling of the Supreme Court of the State, on appeal from that decree, was an adjudication that the jurisdiction of the District Court over the infant never attached.

2d. That the title acquired by the purchaser, Gwyn Page, he being one of the attorneys of the plaintiff Gray, and

that of his law partner Crockett, fell upon a reversal of the decree, and that the defendant, having acquired her interest after such reversal, possessed no valid title as against the plaintiff, the grantee of the original owners.

3d. That the value of the rents and profits of the premises to which the plaintiff is entitled are offset by the value of the permanent and valuable improvements made on the premises by the defendant; and,

4th. That the plaintiff is entitled to judgment for the possession of the premises described in the complaint against the defendant Lucy B. Page.

John B. Harmon, for plaintiff.

Williams & Thornton, for defendant.

MR. JUSTICE FIELD. The material questions presented for consideration in this case have already been determined by the recent decision of the Supreme Court of the United States. It is unnecessary, therefore, to repeat at large the facts of the case; they are given in the report of the decision in 18 Wallace, 350. It will be sufficient to state here its general features. The action is ejectment for the possession of certain real property situated within the city of San Francisco, both parties derailing title from the same source, Franklin C. Gray, deceased, who died in the city of New York in July, 1853, intestate, seised of the premises in controversy. The plaintiff claims through conveyances executed by direction of the Probate Court of the city and county of San Francisco, which administered upon the estate of the deceased. The defendant claims under a purchaser at a commissioner's sale, had under a decree of a District Court of the State, having jurisdiction in that city and county, rendered in a suit brought to settle the affairs of alleged copartnerships between the deceased and others. The case turns upon the validity of this decree and the commissioner's sale had under it.

The suit in which that decree was rendered was one into which two suits, brought by different parties, had been con-

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solidated. One of them was brought in 1854, by William H. Gray, a brother of the deceased; the other was brought in 1855 by Cornelius J. Eaton, who had been at one time a clerk of the deceased. Each of these complainants alleged a separate, distinct and dormant copartnership between himself and the deceased, which embraced the commercial business in which the latter was engaged and all his real estate transactions. Gray alleged that his interest in the business and property of the copartnership formed between him and the deceased was one-third. Eaton claimed that his interest in the business and property of the copartnership formed with him was one-fourth. Each of these complainants, alleging a universal and dormant copartnership between himself and the deceased, denied, one of them under oath, any copartnership of the deceased with the other. Subsequently, however, they consented to a consolidation of their suits; and four days afterwards, a decree was entered, and it would seem from the certificate of the judge appended to the decree that it was by consent of the parties, adjudging that each had been a copartner with the deceased as alleged by him, and that both of these copartnerships, dormant and unknown to each other as they were, embraced all the property and all the business of the deceased.

By the decree a reference was ordered to a commissioner to take an account of the business, profits and property of the two copartnerships, with directions, upon the confirmation of his report, to sell all the property, real and personal, of both copartnerships, and to execute proper conveyances to the purchasers. At the sale which subsequently took place, one of the attorneys of the complainant, Gray, became a purchaser of the premises in controversy. He afterwards conveyed an undivided half to his law partner, and devised the other undivided half to the defendant. His law partner some years later transferred his interest also to the defendant.

The deceased, Franklin C. Gray, left surviving him a widow, Matilda C. Gray, of whom a posthumous child was born in December following, named Franklina C. Gray. By

the law of California the estate of the deceased vested in the widow and child in equal shares; and they both were made parties to the suits of Gray and Eaton; in the first suit the child being made a party by a supplemental bill. Both were non-residents of the State of California and residents of the State of New York; and their absence from this State and residence in New York were averred in the pleadings. Constructive service upon them, by publication under the statute, was therefore attempted. The widow appeared; and upon representation that service had been made upon the infant, a guardian *ad litem* was appointed for her, and he consented to the consolidation of the two suits, and, it would seem, to the decree rendered.

Subsequently, upon appeal to the Supreme Court of the State, the decree of the District Court in the consolidated suit was reversed, on the ground that no sufficient service of summons had been made upon the infant Franklina in the case brought by Eaton; and that, until such service, no guardian *ad litem* could be appointed for her; and on the additional ground that the evidence presented had not established a copartnership between William H. Gray and the deceased. The case was accordingly remanded to the District Court; and subsequently, the two suits, after being on the calendar for trial for nearly a year, were dismissed. The plaintiff acquired his interest and brought the present action after this dismissal.

When the case was originally here, the Circuit Court decided that the record in the suits of Gray and Eaton, in the District Court, did not show that due service of summons by publication had not been made upon the infant Franklina, and as the District Court was a superior court of general jurisdiction, it must be presumed to have had jurisdiction of the subject-matter and of the parties in those suits; and that, in consequence, the sale and conveyance under the decree, notwithstanding its subsequent reversal on the grounds stated, passed a good title to the purchaser; the court holding that where a record of a judgment of a superior court of general jurisdiction was assailed collaterally, it was not enough that the record did not affirmatively

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show jurisdiction, but that it must affirmatively show that the court did not have jurisdiction, or its judgment would be valid until reversed on appeal or vacated in some direct proceeding taken for that purpose. And so the court said that "at the time of the sale, a purchaser was entitled to rely upon the validity of the decree (in the consolidated suit) unless it affirmatively appeared on the face of the record that the court had no jurisdiction of the infant."

But the Supreme Court of the United States took a different view of the case, and held that the adjudication of the Supreme Court of the State, that no sufficient service of summons was ever made upon the infant Franklina, and that until such service no guardian *ad litem* could be appointed for her, was an adjudication that the jurisdiction of the District Court over her had never attached, and that this adjudication was conclusive and binding upon the Circuit Court and every other court, when brought before it for consideration. Into its soundness the Circuit Court could not look; for it possessed no revisory power over the decisions of the Supreme Court of the State. The adjudication constituted the law of that case, and settled, for all possible controversies, the character of the decree of the District Court. Rendered without jurisdiction, that decree was always void, so far as it affected the rights of the infant Franklina, and unavailing to support any proceedings under it affecting her title.

But the Supreme Court of the United States in its decision went still further, and held that the rule stated by the Circuit Court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law. In these latter particulars, the decision was in affirmation of doctrines asserted by the Circuit Court in an elaborate and carefully considered opinion, delivered in 1865, in the case

of *Gray v. Larrimore*, which grew out of the sale under the same decree of the District Court which is now before us. The doctrines there asserted were followed in the subsequent case of *Gray v. Murphy* and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the Circuit Court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the Supreme Court of the State in *Hahn v. Kelly*, rendered in 1868 (34 Cal. 391). And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the Supreme Court of the United States. Extracts from the opinion in the case constituted the principal argument before that court of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of that court, it was not because they had not been carefully considered.

That case was brought to quiet the title to a tract of land in Alameda county, and to restrain its sale. The plaintiff asserted title to the premises by virtue of a sale under a judgment recovered for the deficiency remaining of a mortgage debt, after application of the proceeds received upon a sale of the property mortgaged. The suit in which the mortgage was foreclosed and judgment for the deficiency rendered, was prosecuted without personal service upon the defendant, upon publication of summons; and the validity of the judgment was assailed upon the alleged ground that the attempted service of the summons by publication was defective and void. The decree, however, recited that it appeared to the court that the summons and complaint had been "duly served on the defendants according to law and the order of the judge of the court;" and the Supreme Court of the State held that this recital was a direct adjudication upon the point and was as conclusive upon the parties as any other fact decided, provided it did not affirmatively appear, from other portions of the record, that the recital was untrue. As there was no direct contradiction of the

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recital, and as no other objection than the one mentioned was taken, this ruling as to the effect of the recital disposed of the case and necessitated a reversal of the decree below. The court, however, in its opinion, did not confine its consideration to this point, but proceeded to lay down certain general rules as to the presumptions of jurisdiction attendant upon the judgments of superior courts of general jurisdiction, and to declare what constitutes the record in this State of such judgments, and the conditions upon which they may be collaterally assailed. Among other things, it is asserted in substance, and so far as anything in an opinion can be deemed an adjudication, which is not necessary to the decision, it adjudged:

1. That a judgment of a court of general jurisdiction could not be attacked collaterally, except for matters apparent upon its record; that it was not necessary that the jurisdiction of the court should affirmatively appear upon the record, but that, in the absence from the record of matters affirmatively disclosing a want of jurisdiction, either over the subject-matter of the action or the person of the defendant, such jurisdiction would be conclusively presumed; and that this conclusive presumption prevailed in all cases without reference to the character of the proceedings, or the residence of the parties against whom they were taken.

2. That in this State such record of the court consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment-roll; and, where jurisdiction is exercised over persons without the territorial limits of the court by constructive service upon them by publication of summons, and judgment by default is rendered upon such service, the record need not contain certain material proceedings, without which jurisdiction cannot attach, or any recital or evidence of such proceedings, because the legislature has not directed such proceedings to be incorporated in the so-called judgment-roll.

We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction. The decree in the consolidated

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stitutional requirement, which relates to the faith and credit to be given in each State to the public acts, records and judicial proceedings of every other State, inasmuch as it declares the effect of the records and judicial proceedings of the States when authenticated, as provided "*in every court within the United States*," thus making its provisions applicable to the National courts, as well as to the courts of the States. The power of Congress to prescribe the manner in which the records of the States shall be proved in the National courts, and the effect which shall be given to them, is independent of the constitutional provision. Still the law is to have the same construction in its application to the National courts as to the State courts. It leaves untouched the general principle that the jurisdiction of every court is open to inquiry, when produced in the courts of another sovereignty.

The Circuit Court of the United States for the district of California has the same authority to examine into the jurisdiction of a State court of California, when its judgment is produced, as the Circuit Court of the United States for the district of New York has, when the same judgment is produced before that tribunal. All the Circuit Courts of the United States have the same relation to the State courts; and each will take notice of and administer in proper cases the laws of the States. This court, for example, will take notice of, and, in a proper case, administer the law of New York, just as it will take notice of and administer the law of this State. In all cases the jurisdiction of a State court may be inquired into; but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

We recur now to the rulings in *Hahn v. Kelly*. The first position, that when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the court must be conclusively presumed, is with certain qualifications and exceptions undoubtedly correct. These qualifications and exceptions arise where the proceedings or the

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parties against whom they are taken are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions. As we had occasion to observe in a previous case, "All courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a particular kind of cases, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as may arise upon the high seas; or to the use of particular process in the enforcement of their judgments." (*Norton v. Maeder.*) When we speak of a court of general jurisdiction in civil cases, we do not mean one which has jurisdiction over all subjects and all persons and of all process; but we mean one which exercises a general jurisdiction, in law or equity, according to the well-established principles known to those departments of jurisprudence, over subjects and persons within certain defined territorial limits. When a judgment of such a court is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court over the subject can only be exercised in a prescribed manner, not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits and did not appear to the action, no such presumption of jurisdiction can arise. The judgment being as to its subject-matter or persons out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special

and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several States, and in the Supreme Court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissentient voice. .

The tribunals of one State have no jurisdiction, and can have none, over persons or property without its territorial limits. Their authority is necessarily circumscribed by the limits of the sovereignty creating them. Any exertion of authority beyond those limits would be deemed, as stated in *D'Arcy v. Ketchum*, 11 How. 174, in every other forum an illegitimate assumption of power, and be resisted as mere abuse.

But over property and persons within those limits the authority of the State is supreme, except as restrained by the Federal constitution. When, therefore, property thus situated is held by parties resident without the State, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the State over the property would be defeated, if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the States, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. In this State, the statute, in terms, allows a constructive or substituted service in all cases, whether upon contract or for torts, where the person on whom the service is to be

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made is a non-resident of the State or is absent from it, whether the action be directed against property within the State, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident except as a means of reaching property situated at the time within the State, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it cannot be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time in the State, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the State, not having been personally served within its limits and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the State as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the State is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the State.

Aliens at peace with the United States are allowed access to the courts of the States, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may by chance be brought into the country. It would certainly be a strange application of the statute if an inhabitant of Asia could recover in that way in our courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed

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by the law of this State in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the State or of being wasted, and the information imparted to third parties by filing a notice of *lis pendens* where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the State without the assumption of any territorial jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

“Where a party is within a territory,” says Mr. Justice Story in *Piquet v. Swan*, 5 Mason, 43, “he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non iudice*. * * *

The principles of the common law (which are never to be lost sight of in the construction of our own statutes), proceed yet further. In general, it may be said that they authorize no judgment against a party, until after his appearance in court. He may be taken on a *capias* and brought into court, or distrained by attachment and other process against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court.”

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“Jurisdiction is acquired,” says the Supreme Court in *Boswell’s Lessee v. Otis*, 9 Howard, 348, “in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding *in rem*.”

A substituted service is usually made in the form of a notice published in the public journals, as in this State. “But such notice,” says Cooley (p. 404), in his treatise on Constitutional Limitations, “is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits and therefore under the control of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.”

In *Cooper v. Reynolds*, 10 Wall. 308, similar doctrines are

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laid down by the Supreme Court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon affidavit that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceeded in *ex parte* as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

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“That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.”

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to were well founded, and dissented from the judgment of the court; but in the doctrine laid down in the above citation he always has concurred. It is, in our judgment, the true doctrine, and the only doctrine which is consistent with any just protection to the citizens of other States. Such is the constant intercourse between citizens of different States at the present time that the greatest insecurity to property would exist, if purely personal judgments obtained *ex parte*, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the State. That law would be intolerable, if valid, which would permit citizens of another State to come into this State and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different States who have never been within the State or possessed any property therein. If such judgments could be upheld they

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would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the State, and did not appear to the action. (Hare & Wallace's Notes to Smith's Leading Cases, vol. 1, p, 838; *Picquet v. Swan*, 5 Mason, 535; *Monroe v. Douglas*, 4 Sand. Ch. 182.)*

* In *Oakley v. Aspinwall*, 4 Comstock, 520, Mr. Chief Justice Bronson, in delivering the opinion of the Court of Appeals of New York, said: "When the courts of any State render a judgment against one who was not a citizen of that State, and was not brought into court, the judgment is held absolutely void everywhere else, although it may have been expressly authorized by the legislature of the State where it was rendered. I doubt whether such a judgment is of any force in the State where it was rendered. Under our form of government it is questionable, to say the least, whether the legislature can, in any case, without an express license from the people, authorize a judgment which shall operate *in personam* against a defendant who neither appeared nor was in any way served with process. The State must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has power to provide that a man may be condemned unheard."

In *Webster v. Reid*, 11 How. 459, it appeared that the legislature of the territory of Iowa had directed that suits might be instituted against the owners of half-breed lands lying in Lee county in that territory, and notice be given to the owners through the *Iowa Territorial Gazette*. Suits having been instituted by notice in that way, and judgments recovered, the Supreme Court of the United States declared that they were nullities. "These suits," said Mr. Justice McLean in delivering the opinion of the court, "were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not, does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

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The second position laid down in *Hahn v. Kelly*, requires us to consider what papers and proceedings constitute the record of a court of general jurisdiction, which may be looked into when a judgment of that court rendered against a person without the territorial limits of the court, upon constructive service by publication, is assailed collaterally for want of jurisdiction. In that case, it is held that such record consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment-roll; and that it need not contain the affidavit of the party and the order of the court, without which constructive service of the summons by publication cannot be made.

The statute authorizing constructive service by publication of summons upon non-resident and absent parties, requires certain facts to be presented by affidavit to the court in which the action is pending, or to a judge thereof, or to a county judge. If it appear upon such presentation to the satisfaction of the court or judge that the facts exist, an order may be made for the publication of the summons, and such order must prescribe the period and designate the paper in which the publication is to be made; and if the residence of the defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to him at his place of residence. The service of the summons is deemed complete at the expiration of the time prescribed by the order for publication.

The statute, in the same title which treats of the manner of commencing civil actions, after stating the manner in which service shall be made in case of personal service, and in case of service by publication, provides in sections almost immediately following, that "Proof of the service of summons shall be as follows: 1. If served by the sheriff, his certificate thereof. 2. If served by any other person, his affidavit thereof. 3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and on an affidavit of a deposit of a

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copy of the summons in the post-office, if the same has been deposited."

In another part of the same statute, in a different title and chapter, treating of a different subject, "the manner of giving and entering judgment," it is provided that immediately after entering the judgment, in case the complaint be not answered, the clerk shall attach together the summons with the affidavit or proof of service, and the complaint with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; and that these papers shall constitute the judgment-roll in the case.

Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately preceding in the same title speak; as if the language were as follows: "Proof of the service of summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows." The obvious meaning intended is, that the proof of service, which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit could be used to establish conclusively a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication, to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must therefore be connected with the affidavit, or the proof will amount to nothing. The affidavit by itself is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

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When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is in giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in *Hahn v. Kelly*.

That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the court, for it says: "In our judgment, it would have added to the completeness of the record to have made the proof of service by publication include, also, the affidavit of the party, and the order of the court directing publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll.

If, however, we are mistaken, and the order, which is the foundation of and the only authority for the publication, is no part of such roll, or, if not mistaken, we are bound to accept as correct, the construction of the statute given by the State court, then inquiry into the jurisdiction of the court cannot be limited, on a collateral attack, to the contents of the roll. The remaining record of the proceedings would be of equal authority and verity, and could be equally relied upon. The record at common law, which imported absolute verity, was a history of all the acts and proceedings in the action, from its initiation to final judgment, enrolled upon parchment for a perpetual memorial and testimony. These rolls were called records of the court, and

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were, in the language of Blackstone, "of such high and supereminent authority, that their truth was not to be called in question." A record, professedly embracing only a portion of such acts and proceedings, cannot be entitled to similar implicit credit, and cannot equally close the door against collateral attack. The use of the same designation to indicate a different collection of acts and proceedings, cannot, of course, carry with it the same import. If the legislature should declare that only that portion of the proceedings in an action, which constitutes the judgment itself, should be enrolled, it would not be any less illogical to insist that to that enrollment parties should be confined when questioning the jurisdiction of the court, than it is that they shall be confined to any other defective record of the proceedings in the action.

When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any State court. It has been repeatedly asserted by the Supreme Court of this State in the most emphatic manner. "A contrary course," said that court in *Jordan v. Giblin*, in 1859, "would encourage fraud and lead to oppression." (12 Cal. 100.) "A failure to carry out the rule thus prescribed," said the court, speaking through Mr. Justice Sanderson, in *Ricketson v. Richardson*, 26 Cal. 149, "in any particular is fatal where it is not cured by an appearance." In *Forbes v. Hyde*, 31 Cal. 342, decided in 1866, the same doctrine is recognized. There the objection to the insufficiency of an affidavit made to obtain an order of publication, was allowed on a collateral attack to the judgment under which the plaintiff claimed title in ejectment. As the statute only requires certain facts to appear by affidavit *to the satisfaction of the court or judge*, we should be inclined, in the absence of this decision, to hold that defects in the affidavit could be taken advantage of only on appeal, and could not be urged collaterally. We cite the case, however, not only because it reiterates the rule of strict construction, because of the special reason it gives for its enforcement in

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this State, in the observation that there is probably "no State in which so many have waited and are still waiting for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice." "It may be important," continues Mr. Justice Sawyer, in delivering the unanimous opinion of the court, "to the interests of those who suppose they have acquired rights under this class of judgments, that they should be upheld. But it is equally important that the interests of parties who have only been constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy where a party has no notice; for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in *Smith v. Rice*, 11 Mass. 512, 'The very grievance complained of is, that the party had no notice of the pending of the cause, and of course no opportunity to appeal.'

Now, if the rule in *Hahn v. Kelly* be correct, we have this singular result: that whilst the statute must be strictly followed before jurisdiction can be acquired over the person, a party against whom a judgment is rendered is precluded from examining the proceedings, by which alone it can be seen whether the statute has been followed. In other words, the court says no jurisdiction is acquired by the court if the requirements of the statute be not pursued, but the record of the proceedings taken shall always be a closed book.

If the order of the court is no part of the judgment-roll it cannot be brought before the court on appeal, unless a statement or bill of exceptions be made up; and either of these proceedings supposes the presence of the parties or counsel. If any other direct proceedings are taken they

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might result in vacating the judgment; but under the ruling in the case cited, the record being regular on its face, the purchaser, if a third party, would be protected, and the wronged defendant be left to the doubtful chances of recovering the value of his property by action against the plaintiff.

From the examination we have thus been able to give to the case of *Hahn v. Kelly*, we do not find in it sufficient reasons to depart from the old and well-established rules formerly recognized in the Supreme Court of the State, the observance of which, as we are more and more impressed every day, is essential to the protection of the rights of all citizens, whether resident or non-resident of the State.

The proceedings for constructive service by publication, which the statute authorizes, are, as stated by Mr. Justice Sanderson in the case of *Rickelson v. Richardson*, "in derogation of the common law;" that is, they are not in accordance with the course of the common law.

It was the boast of that law that it condemned no one in his person or his property without his day in court. That there must be citation before hearing, and hearing, or opportunity of being heard, before judgment, was a cardinal principle which pervaded all its judicial proceedings. And when the articles of compact contained in the ordinance of 1787, for the government of the Northwest territory declared that its inhabitants should always be entitled "to judicial proceedings according to the course of the common law," it was believed by them that they had in that guarantee the assurance of full protection to all their private rights; and that the language was not used "mainly for ornamental purposes," having a certain "rotundity of sound which is pleasing to the ear" but leaving "no definite impression upon the understanding."* (*Hahn v. Kelly*, 34 Cal. 411.)

* In speaking of these terms—"proceeding according to the course of the common law"—the court, in *Hahn v. Kelly*, uses this language: "Some words are used to express ideas, and others to ornament them. The more we turn this expression over, and examine it by the light of reason, for the purpose of determining to what use it has been put, the more we are inclined to the opinion that it has been used merely from force of habit, or

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The common law recognized no such proceeding as a personal judgment without the appearance of the party, and probably in no other case than *Hahn v. Kelly* were proceedings to outlawry ever cited as a mode "amounting or equivalent to constructive service," by which a common law court obtained jurisdiction. "By the strict rules of the common law," says the Supreme Court of New Jersey, in *Hess v. Cole*, 3 Zab. [116] 16, "it was necessary in every suit, not only that the defendant should be served with process, but that his appearance to the action should be effected. Every student is familiar with the cumbrous machinery and complicated process by which the courts sought to compel the *appearance* of the defendant. He is familiar also with the principle, that if the defendant was contumacious and refused to appear to a mere civil action, the proceedings were at an end. No judgment could be rendered. Every common law record shows upon its face that the defendant was either in custody, or was summoned or attached to answer to the action. And however inconvenient may have been the strictness with which the principle was applied, and the extent to which it was enforced in ancient common law proceedings, the principle itself is by no means peculiar to the common law. It pervades, in fact, every code of law and every well-regulated system for the administration of justice."

The opinion in *Hahn v. Kelly* is not only singular in its reference to proceedings to outlawry for want of appearance of a party, but the citations from Blackstone, to show that the courts of chancery would proceed to judgment upon a constructive service of process at all analogous to service by publication, establish nothing of the kind; and only seem to do so because they are detached from their context

mainly for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed, its use was harmless, for there was then no mode of procedure except such as the common law prescribed, but its continued use where the modes of the common law have been superseded is mischievous."

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in the volume. They relate to proceedings to compel the appearance of parties *after service of the subpoena*, which is the original process in chancery, as any one will see who will read the whole page in Blackstone from which the citations are taken.

Service of the subpoena could indeed be made by leaving a copy at the actual residence of the defendant, as well as by delivering a copy to him personally. And in special cases where an absent or absconding defendant had appointed a person to act as his agent in the matter litigated, substituted service upon such agent in lieu of the principal was, upon application to the court, sometimes allowed. (Adams's Equity, 324; *Hobhouse v. Courtney*, 12 Simons, 130.) But it was not until the statute of 5 George II, c. 25, that proceedings could be taken by publication without service in one of the modes indicated. That statute authorized proceedings by proclamation published in the *London Gazette*, and read in the parish church, and posted in the Royal Exchange, where a defendant had absconded to avoid service. It did not apply to a citizen or subject of another government who had never been in the realm.

Passing from *Hahn v. Kelly*, we proceed to consider the other positions taken by the defendant to defeat a recovery. It is contended by her counsel: 1. That the cases of Gray and Eaton were suits *in rem*, and that the decree in the consolidated suit bound the property without reference to the defective service of summons upon the infant. 2. That the District Court had authority to appoint a guardian *ad litem* for the infant without previous service upon her; and 3. That the decree in the consolidated suit was not reversed as to the widow Matilda.

1. Suits *in rem* may be divided into four classes: 1st, those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of individual claimants; 2d, those which are instituted to determine the status of particular property or persons; 3d, those which are, in form, personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding, under the

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control of the court, so as to give effect to the rights of the parties; and 4th, those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered. Proceedings in admiralty for the forfeiture of a vessel or goods are instances of the first kind; the suit is there brought against the vessel or goods directly, without reference to the rights of persons, and all parties are notified to appear by a designated day and assert their claims, or the property will be condemned. Proceedings in the probate court upon the validity of a will are instances of the second kind; the judgment, when rendered, operating directly upon the status or condition of the instrument, determining its validity or invalidity. Proceedings by attachment against the property of debtors, or to foreclose a mortgage, or other lien upon property, or to partition real estate, are instances of the third kind. Proceedings to compel the execution or cancellation of a conveyance of real property in the State and proceedings to wind up and dispose of partnership property are instances of the fourth kind. The third and fourth classes mentioned are not strictly proceedings *in rem*; but so far as they affect property in the State, they are treated as substantially such proceedings.

In proceedings *in rem* notice of some kind is required, but as all property is supposed to be in the possession of its owner, either in person or by agent, a seizure of property is, of itself, considered to impart notice of the proceeding to the owner. Therefore, where the property is, at the outset, taken into the custody of the court, the law is less strict in requiring further notice, either generally by proclamation to all persons, or specially to the reputed owner. But where the property to be affected is not thus at the outset taken into custody, there is no constructive notice given by the proceeding; and the same notice, as provided by law, must be given to the defendant, as in actions where a personal judgment for damages is alone sought. "A proceeding," says the Supreme Court of Vermont, in *Woodruff v. Taylor*, 20 Vermont, 65, where the law on the subject of suits *in rem* is stated with great clearness, "professing to de-

termine the right of property where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It will be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The suits of Gray and Eaton were partly *in personam*, and were, at the same time, intended to subject property in the State to the disposition of the court; but as the property was not taken into custody at the outset, there was no constructive notice given to the owners or claimants by the proceeding, and the absent and non-resident defendants could only be brought before the court by publication of summons, as provided by statute, and this, as the Supreme Court held, was never done, so far as the infant Franklina was concerned.

2. As to the authority of the District Court to appoint a guardian *ad litem* for the infant without previous service upon her, it is sufficient to observe that the Supreme Court of the State on appeal decided that no such authority existed. The statute requires service of summons on all infants, before a guardian *ad litem* can be appointed, and makes no difference in this respect between an infant of a few months, and one nearly attaining his majority, and the service can no more be dispensed with in the one case than in the other. Besides, there is wisdom in the provision requiring service even upon an infant in its cradle, for the papers, through its nurse or relatives, would almost be sure in such case to find their way into hands of parties who would look after the interests of the child. Be this as it may, it is the proceeding required by the legislature before the jurisdiction of the court can attach; and as Chief Justice Taney said of a mere formal objection which was insisted upon in the Supreme Court, nothing is unimportant or to be disregarded which the legislature has prescribed as a condition for exercising the jurisdiction of the court. Where personal service cannot be made by reason of the non-residence in the State or absence of the infant, service must be made by publication as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant.

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3. The objection, that the decree of the District Court in the consolidated action was not reversed as to the widow Matilda, is not founded upon fact. There was but one decree, though the court speaks in its opinion as though there were two separate decrees before it. This is an evident inadvertence in the language of the court, arising from the fact that the objections to the validity of the decree were taken to the separate proceedings had before their consolidation. The case was remanded for further proceedings; and on filing the remittitur, the question evidently arose as to what proceedings should be had, and after hearing counsel for the parties, the court ordered a new trial on all the issues as to all the parties. Upon this order the case remained on the calendar of the District Court for trial for over a year, and was then dismissed. The order of dismissal was entered in the consolidated suit, and it would appear for greater caution in the separate suits also.

The decree as to the infant Franklina being void for want of jurisdiction in the District Court over her; all proceedings founded upon such decree, so far as her rights are concerned, necessarily partake of the same infirmity. The purchaser of the premises being one of the attorneys of the plaintiff Gray, the law, as held by the Supreme Court, imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his partners. The conveyance of the undivided half to his law partner was made after the reversal of the decree, and the latter also took his interest with similar knowledge of the defect. Independently of this fact, their title fell with the reversal of the decree. On this subject we can add nothing to what was said in the opinion of the Supreme Court, except that the doctrine of *Reynolds v. Harris* was reaffirmed in the late case of *Reynolds v. Hosmer*, reported in 45 Cal. 617.

As to the claim for rents, we are of opinion that the cost of filling up the water lot, which was a valuable and permanent improvement, is a just offset to the rents received or which might have been received by the defendant.

It follows from the views we have expressed that the plaintiff is entitled to judgment for the possession of the premises; and such judgment will be entered upon the findings filed, with costs.

IN RE C. B. COMSTOCK & Co.

DISTRICT COURT, DISTRICT OF OREGON.

SEPTEMBER 3, 1874.

1. ACT OF CONGRESS NOT RETROSPECTIVE.—The provision of the act of June 22, 1874 (11 Stat. 181,) amendatory of the bankrupt act, requiring one-fourth in number and one-third in amount of the creditors to join in a petition for an adjudication in bankruptcy, in cases commenced prior to its passage and since December 1, 1873, does not apply to any of such cases in which there had been an adjudication prior to the date of said act.
2. ADJUDICATION IN BANKRUPTCY.—A petition in bankruptcy is an action or suit, and an adjudication of bankruptcy thereon is a final judgment, which judgment is beyond the power of congress to annul or set aside.

Before DEADY, District Judge.

On December 16, 1873, a petition in bankruptcy was filed in this court against C. B. Comstock & Co., upon which they were adjudged bankrupts on January 9, 1874; which adjudication was affirmed in the Circuit Court on May 9 thereafter.

On January 30, the Bank of British Columbia proved a debt against the estate, of \$6620.28, to which the assignee, on June 10, filed objections.

On July 31, the bank moved to strike the objections from the files, because the court had no jurisdiction to proceed in the case since June 22, 1874, for the reason that it appeared that less than one-fourth in number and one-third in amount of the creditors had joined in the petition.

Thereupon at the request of the parties, the register certified the question to the judge for decision, with an opinion against the motion.

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William A. Effinger, for the creditor.

William Strong, for the assignee.

DEADY, J. Section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874, makes it necessary for at least one-fourth of the creditors in number and one-third in value to join in the petition to have their debtor adjudged a bankrupt; and provides that this provision "shall apply to all cases of compulsory or involuntary bankruptcy commenced since December 1, 1873."

The petition in this case was not brought by such a proportion of the creditors, either in number or value.

The case having been "commenced since December 1," is within the mere letter of the act, but I do not think it is within the intent or purpose of it.

This has been so held by Hopkins, D. J., *In re Raffauf*, 10 N. B. R. 69; by Longyear, D. J., *In re Angell*, Id. 73; by Krekel, D. J., *In re Rosenthal*, 1 Cent. L. J. 364; by Withey, D. J., *In re Pickering*, Id. 372; and by Dillon, C. J., *In re Obear* and *In re Thomas*, Id. 362.

A petition to have a debtor adjudged a bankrupt is to all intents and purposes an action or suit. The direct and immediate object of the proceeding is to obtain the judgment of the court that the debtor is a bankrupt. From the filing of the petition until the court pronounces upon this question, the action is pending. But so soon as judgment is given, either that the debtor is a bankrupt or not, it is no longer pending. The action has passed into judgment—not interlocutory but final. True, there may follow long and complicated proceedings in the court concerning the settlement and distribution of the bankrupt's estate, but these are only consequences or incidents of such final judgment. Upon an execution to enforce an ordinary judgment in an action at law to recover money or specific property, there may be proceedings against third persons for the purpose of subjecting money or property due from or held by such persons to the satisfaction of said judgment.

A decree dissolving the marriage relation is a final one,

so far as the direct object of a suit for divorce is concerned, although the court may thereupon be authorized and proceed to make further decrees and orders, and change and modify the same from time to time, concerning the property of the parties and the custody and maintenance of their children.

A decree admitting a will to probate is a final one so far as the validity of the will is concerned, although the court, as a consequence of such decree, may proceed to administer and distribute the estate of the testator.

Admitting that the legislature can modify or change the remedy in a particular case, even after the commencement of proceedings, such modification or change would only apply to pending cases. In the cases suggested there is no longer a remedy to be affected by the legislation. It is *functus*—merged or passed into judgment. The rights of all parties to the proceeding have thereby become determined and vested, beyond the reach of legislative caprice or control.

So in the case at bar. The petition to have Comstock & Co. adjudged bankrupts was no longer pending when the amendment of 1874 took effect. It had served its purpose and the adjudication upon it had determined the status of the debtors, and authorized the court to distribute their estate among their creditors.

Even if it were within the power of Congress to annul all the many adjudications in bankruptcy that were had throughout the country between December 1, 1873, and June 22, 1874, upon petitions filed since the former date, the act would be such an unreasonable, arbitrary, and unjust one that no court would hold that Congress so intended unless the intention was expressed in the plainest and most explicit language. So long as the act was capable of any other construction it should be adopted in preference to one which would lead to such monstrous and extraordinary results. (See *In re Obeir* and *In re Thomas*, supra.)

For these reasons I conclude that the act of 1874, requiring that in all cases of involuntary bankruptcy, commenced since December 1, a certain proportion of the creditors

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should join in the petition, was not intended to apply to the cases determined before its passage. As was said *In re Raffauf*, supra: "Its requirements are satisfied with an application of its provisions to existing cases before adjudication, and such, it seems to me, is the obvious meaning of the amendment;" and, also, *In re Angell*, supra: "The enactment in question is given full effect, and in my opinion all the effect Congress intended it should have, by applying and limiting it to cases still pending, and undisposed of by adjudication."

In re Joliet I. & S. Co., 10 N. B. R. 60, and *In re Scammon*, Id. 66, it was held that the act of 1874 applied to all cases commenced since December 1, and still pending or not adjudicated at the date of its passage; and, therefore, that the petitions in such cases must be amended so as to show that the requisite number and value of creditors join in it, before the court can give judgment. In the first case *Blodgett*, D. J., said: "It is manifest, then, that from the time this becomes a law *no person can be adjudged a bankrupt* unless the requisite number of creditors join in the petition, because it must be upon their petition: * * *. Taking the whole scope of the act, it seems to me, that in all petitions where adjudication has not already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition;" and in the second one: "The evident spirit and intent of the amendment is that all *cases pending*, commenced since December 1, shall conform to and proceed upon the requirements of the law in the same manner as new cases."

Now, although this precise question was not before the court in those cases, yet the plain import of the passages quoted is, that when the cases had passed into judgment they are not *pending*, and therefore not within the intention of the act.

But if it were manifest that it was the intention of congress that the act should apply to all cases commenced since December 1, whether they had passed into judgment or not, it is equally plain that it is not within its power so to pro-

vide. The necessary effect of such an enactment in this case, would be to annul and set aside the judgment determining Comstock & Co. to be bankrupts, and to grant them a new trial. This would be the exercise of judicial power—a power which congress does not possess. By the constitution (Art. 3, Sec. 1) it is provided: “The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as the Congress may from time to time ordain and establish.”

In *Wheeling Bridge Case*, 18 How. 431, Mr. Justice Nelson says: “But it is urged, that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. *When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.*” In the same case, at page 440, Mr. Justice McLean says: “The Congress and the Court constitute co-ordinate branches of the government; their duties are distinct and of a different character. *The judicial power cannot legislate, nor can the legislative power act judicially;*” and at page 449 Mr. Justice Greer says: “Congress cannot annul or vacate any decree of this court. The assumption of such a power is without precedent, and, as a precedent for the future, it is of dangerous example.”

Counsel for the motion has attempted to show how this act may be applied to this case without annulling the judgment, by merely staying any further proceeding herein, as upon a *stet processus*, until the petition has been amended in conformity with it. But this implies that the amendment can be made, whereas the petitioner may not be able to get the requisite number of persons to join in the petition, and in that event the judgment is practically annulled, because no proceedings can be taken under it or in consequence of it. But if the amendment can be made, the debtors must be allowed to controvert it, or else it is a mere fiction, which may be alleged as a matter of form, to give the court jurisdiction. If the amendment is controverted, a trial must

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take place on this issue, which may result in a judgment dismissing the petition, and in that case what becomes of the former judgment? In effect it is annulled from the time it is considered within the purview of the act requiring the amendment of the petition.

That such is the effect of applying the act to this class of cases, it seems to me there can be no doubt. For instance, on December 2, 1873, the law of this State being, that a party might bring an action against an absent debtor and attach his property within the State to satisfy any judgment which he might obtain therein, upon the service of a summons by publication, suppose A. commenced an action in that manner against B., and obtained judgment before June 22, 1874, when the legislature changed the law and provided that service of a summons should not be made by publication except upon conditions and under circumstances materially different and in addition to those required by the old law, and further, that this provision should be retroactive and apply to all cases commenced since December 1, 1873, can it be claimed that this act could be applied to the case of A. v. B. without practically annulling and setting aside the judgment therein? Manifestly not.

The only practical solution of the question, is to hold that the act of 1874 merely applies to pending cases—cases in which the action has not been brought to a termination—and that cases which have passed into judgment are not pending ones, but *res adjudicata*, and therefore beyond the domain of legislation.

J. P. ROBINSON v. JOHN SATTERLEE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 7, 1874.

1. JURISDICTION—LEAVE TO RENEW MOTION.—Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew the motion.
2. DISTRICT JUDGE SITTING AS CIRCUIT JUDGE.—A judge of a United States District Court, while sitting alone as circuit judge, in the United States Circuit Court, has the same powers and jurisdiction as any other judge sitting in the same court.
3. DISMISSAL OF BILL FOR WANT OF REPLICATION.—Under the sixty-sixth equity rule prescribed by the United States Supreme Court, the order dismissing the complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to, or action by the judge.
4. SAME.—The dismissal is final unless set aside by the court upon application duly made within the proper time in pursuance of the provisions of the rule.
5. SAME—LACHES.—Where a bill has been dismissed for want of a replication under the sixty-sixth equity rule, a motion to set aside the dismissal made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied.
6. SUPPLEMENTAL ANSWER—FORMER JUDGMENT.—Where leave to set up by way of amended answer a former judgment between the same parties upon the same subject-matter had been denied, pending an appeal from the judgment sought to be set up, leave to file a supplemental answer setting up said judgment was granted upon renewal of the motion upon leave after the judgment had become final by affirmance on appeal. (Per HOFFMAN, J. See statement of the case.)

Before Mr. Justice FIELD and SAWYER, Circuit Judge.

Motion to set aside an order granting leave to file a supplemental answer; also, to set aside an order dismissing the bill under the sixty-sixth equity rule for failure to file replication. The bill was filed January 18, 1868. The defendant, Satterlee, entered his appearance March 2, 1868. April 18, in default of an answer, an order was entered taking the bill *pro confesso*. On application of defendant, Satterlee, the default was opened April 23, "with leave to file an answer herein within five days denying the allegations of complainant's bill and setting up title in defendants." On the

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same day a further application for leave to set up as another answer, by way of estoppel, a judgment between defendants and the grantor of complainant upon the same subject-matter, was denied, by Deady, District Judge, sitting as Circuit Judge. On April 27, defendant filed his answer to the bill. On July 8, another application for leave to file an amended answer, was denied by Mr. Justice Field, "it appearing that a similar motion had been previously considered and denied." On August 21, 1869, defendant, Satterlee, by leave of the court, applied for leave to file a supplemental answer setting up the prior judgment between defendants and the complainants' grantors, upon affidavits excusing default; showing mistake in his prior applications, and that said judgment which he sought to set up by way of estoppel, had, since the commencement of this suit, and since the former application, become final, by its having been affirmed by the Supreme Court of the State on appeal. Leave to file such supplemental answer was granted by the Court, Hoffman, District Judge, presiding, and giving a written opinion upon the application, which is as follows, to wit:

HOFFMAN, J. "An order to take the bill *pro confesso* having been duly entered by the complainant's solicitor on April 18, 1868, the solicitor for the defendants, on April 22, obtained from the court an order that the default be set aside, and that he have leave, on payment of complainant's costs, to file within five days an answer denying the allegations of the complainant's bill and setting up title in the defendants.

"On the succeeding day, the solicitor of the defendants moved for a modification of this order, so as to permit them to set up and plead a former recovery in favor of William S. Reese against the predecessors and grantors of the complainants, for the lands described in the bill, which judgment and recovery was obtained in the District Court for the Twelfth Judicial District of this State.

"On this application, an order was entered denying to the defendants the leave applied for. It is now stated, that the judgment, leave to plead which was denied, was by mistake

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described as a judgment rendered in the Fifteenth District Court in a suit between the administrator of Wm. S. Reese, deceased, and the grantors of the complainants, and that the judgment intended to be pleaded was the judgment obtained in the Twelfth District Court, and affirmed on appeal by the Supreme Court, and not the judgment subsequently obtained in the Fifteenth District Court, which had not, at that time, become final, but the same was suspended by an appeal.

"On July 3, 1868, a motion was again made for leave to file an amended answer, and to plead the final judgment obtained as above stated. But the motion was denied by the presiding judge of this court on the ground that "a similar motion had been made and denied."

"A motion is now made for leave to file a supplemental answer or plea, setting up the judgment obtained by the defendant, Satterlee, administrator of the estate of Wm. S. Reese, against George D. Bliss, and John O'Connell, in the bill of complaint mentioned, which judgment has, since the denial of said motions, and on April 20, 1869, by the decision of the Supreme Court of this State, become final and conclusive.

"If this were merely the renewal of a motion already denied on its merits, the fact of such previous denial would not prevent the court, in its discretion, from giving leave to renew it, and subsequently granting it.

"In *White v. Munroe*, 33 Barb. R. 645, the court says: 'It is entirely in the discretion of a court to hear a renewal of a motion or not. They can, as they may deem advisable, hear it on precisely the same papers. This, of course, will be rarely allowed; it would be productive of serious inconvenience, but still there may be occasions which would render it essential to justice. In motions such as these, not appealable, a grievous wrong may be committed by some misapprehension or inadvertence of the judge, for which there would be no redress if this power did not exist.' In the case of *Simson v. Hart*, 14 Johns. R. 76, the court, per Spencer, J., says: 'Courts, to prevent vexatious and repeated applications on the same point, have

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rules which preclude the agitation of the same question on the same state of facts. These rules are for the orderly conduct of business, and are not founded on the principle of *res adjudicata*. It is not uncommon in courts of law, to deny a motion one day, and on another day to grant it on a more enlarged state of facts.'

"That the doctrine of *res adjudicata* does not strictly apply to motions in the course of practice has been held in numerous other cases. (See Reporter's note in 5 Hill, 490; *Smith v. Spalding*, 3 Robertson's R. 616-17, and cases cited; *Cooper v. Jagger*, 1 Chitty's R. 445.)

"In *Belmont v. The E. R. R. Co.*, 52 Barb. Sup. Court R. 649, the court, after citing numerous cases, says: 'It would seem, therefore, that if it be possible that anything should be deemed to be settled by authority, the proposition that a motion may, upon application to the court, be opened and heard anew, if the court, in its discretion, thinks sufficient reason exists for doing so, must be considered as conclusively established.'

"Such being the authority of the court with respect to motions once made and denied, it is its duty to entertain a motion for leave to renew and to exercise its judicial discretion, whether to grant or withhold the leave. This discretion it is bound to exercise, whether the motion has been originally denied by the same judge as the one of whom leave to renew is asked, or by another.

"If, however, in this case, the motion now made had been considered and decided on its merits by Judge Deady and Mr. Justice Field, I should feel the utmost hesitation in permitting it to be renewed.

"But the motion before Judge Deady was merely to amend the order to open the default previously granted by him. If, as the minutes show, it was a motion to modify by allowing the defendants to set up and plead the former adjudication in *Satterlee v. Bliss and O'Connell*, it may have been denied, on the ground that that suit was still pending on appeal and had not passed to final judgment. If, on the other hand, the motion was, as stated by counsel, to allow defendants to plead the judgment obtained in *Reese v.*

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Mahoney, then the motion denied was different from the present one, which is to allow the defendants to set up the judgment in *Satterlee v. Bliss and O'Connell*, obtained since the former motion was denied.

"It is also suggested by counsel, that the motion to modify may have been denied on the ground that the modification was unnecessary, as the defense could be made under the order opening the default as it stood.

"The motion made before Mr. Justice Field appears to have been denied on the sole ground that a similar motion had already been made and denied. It does not appear that if the merits had been presented to the judge, on a motion for leave to renew, that the leave would have been refused. The fact that no such leave had been obtained was of itself sufficient ground for refusing to entertain the motion. (5 Hill, 493; 12 Wend. 290; 8 How. Pr. R. 115.)

"In the present case, if the motions heretofore denied were for leave to set up the judgment in *Reese v. Mahoney*, the present motion is different, for it is for leave to set up the judgment in *Satterlee v. Bliss and O'Connell*.

"Even 'slight variations in the form of the motion or the character of the relief asked for seem to be sufficient (*Bonnell v. Henry*, 13 How. Pr. R. 142; *Frost v. Flint*, 2 Id. 125) to allow a substantial renewal.' (3 Robertson, 617.) But if the motions denied were for leave to set up the judgment in *Satterlee v. Bliss and O'Connell*, the fact that since the denials of those motions that judgment has become final, and for the first time available to the defendants as a defense to this action, is a sufficient reason why the motion heretofore properly denied should now be granted. In either point of view, the matter comes before the court as a new motion, not heretofore made or denied, or as a motion renewed on grounds not heretofore considered, and on a state of facts not heretofore existing. (*Willett v. Fayweather*, 1 Barb. 72; *Carneau v. Bryant*, 6 Duer, 688.)

"In point of fact the judgment, leave to set up which was intended to be asked for, was the judgment in *Reese v. Mahoney*, as appears by the defendant's affidavit, which is not

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controverted, and the motion now made is for leave to set up another judgment which has since become final.

“If, as alleged by the defendants, the whole subject-matter of this suit has been already adjudged and determined between these parties and their privies, in a court of competent jurisdiction, I can see no reason why the defendants should not be allowed the benefit of that decision.

“The transcript, consisting of a large printed volume and exhibited in court, shows the litigation to have been very protracted. After a long trial the questions of fact were submitted to a jury, and the questions of law subsequently adjudicated by the Supreme Court—*nemo debet bis vexari pro eadem causa*, and if, as alleged by counsel, the entire right in this case has once been litigated and passed upon, why should not the rule be applied? To deny the defendants the benefit of a rule resting on such solid grounds of justice and public policy, because, through accident or inadvertence, he has incurred a default, would appear unreasonable and unprecedented.

“I think, therefore, that the motion for leave to set up in a supplemental answer the judgment in *Satterlee v. Bliss and O'Connell* should be granted.”

In pursuance of leave so granted, the supplemental answer was filed on the same day, August 21, 1869. On September 7, 1869, the next rule day after the filing of the said answer having passed without any replication or exceptions having been filed either to the original or supplemental answer, and the cause not having been set down for hearing on bill and answer, the defendants entered in the proper form, in the clerk's office, a rule dismissing the complainant's bill for want of replication, under equity rule 66. The cause stood in this condition as dismissed till August 22, 1874, when the present motion was made to vacate the order of August 21, 1869, granting leave to file a supplemental answer. Also, the order of September 7, 1869, dismissing the bill under rule 66, on the ground that both orders are void upon their face for want of authority to make them. The motion was made upon the record.

J. B. Felton and Wm. H. Patterson, for plaintiff.

McAllisters & Bergin, for defendants.

By the Court, SAWYER, Circuit Judge. We have no doubt that Judge Hoffman had jurisdiction to grant leave to defendant to renew his motion for permission to file an amended and supplemental answer; and upon the hearing of the application made in pursuance of leave so granted, to make a valid order permitting such answer to be filed, notwithstanding the fact that a similar application had before been denied by another judge of the same court. The cause was still pending, and not even at issue, and the fact that a similar application had before been heard and denied, was matter addressed to the sound discretion of the judge in view of the circumstances presented by the case.

While sitting as circuit judge, his authority was co-extensive with that of any other judge sitting in the same court. His action was, clearly, not void.

The answer was duly served and filed within the time, and in pursuance of the leave granted by the order of the court, and was, therefore, regularly filed.

Under the sixty-sixth equity rule prescribed by the Supreme Court of the United States, the complainant was required, on or before the next succeeding rule day, either to except or file a general replication to the answer. And the rule provides that, "if the plaintiff shall *omit*, or refuse to file such replication within the prescribed period, the defendant *shall be entitled to an order as of course*, for the dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion *for cause shown*, allow a replication to be filed *nunc pro tunc*, the *plaintiff submitting to speed the cause*, and to such other terms as may be directed."

In this case the plaintiff did not file his replication, except to the answer, nor take any other action on or before the next succeeding rule day; and the time having expired, the defendant, on September 7, 1869, procured an order to be entered in the proper order-book before the clerk dismissing

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the action, as he was entitled to do under the rule. This is an *order of course* entered in the clerk's office under the rules, without any action of the judge in person. The rules authorize the entry of the order by the clerk, and no other action of the judge is necessary. That these and other analogous orders of course, are to be entered in the clerk's office by the clerk without the intervention of the judge, will be clearly apparent from an examination of equity rules 2, 4, 5, 12, 18, 38, and other rules in connection with rule 66. (See also Conkling's Treatise, 386, third edition.) The order of defendant having been regularly entered, its effect is prescribed by the rule, "*the suit shall thereupon stand dismissed.*" The order granting leave to file the supplemental answer was made, and the answer filed more than five years, and the order dismissing the bill within a few days of five years, before the present motion was made, and no other action of any kind appears to have been taken in the meantime. The bill during all that time under the rule has stood as dismissed; and the motion to vacate the order granting leave to file the answer, and the order dismissing the bill, are now made on the sole ground that these orders are void—no excuse for laches being attempted to be shown.

We think the orders valid, and that no ground is shown for disturbing them at this late date.

It was suggested that many cases are actually heard in this court without replications, the bar not being generally familiar with the equity rules. This is doubtless so, the members acting in some cases upon the assumption that the practice in equity cases, as at law, is governed by the State practice. When no objection is made for want of replication, the court has not taken the trouble to see that the rule has been strictly complied with. The rules of the court, however, are very simple and plain, and must be observed.

It would be difficult to account for the complainant's slumbering for five years upon his rights upon any theory that he was ignorant of the rules, nor could any such reason be admitted if it were the fact. He was prompt enough in taking his order *pro confesso* under a similar rule (rule 18), entered in the same manner, in the same order-book, on de-

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fendant's original default. The court will, doubtless, deal liberally in relieving parties from their excusable defaults when application is *promptly made and good cause shown*, as required by the rules. But this is no such case.

Motion denied, with costs.

EDWARD MINTURN v. THOS. A. SMITH.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 14, 1874.

1. TAX DEED.—The general statute authorizes a tax collector for State and county taxes to execute a deed upon a tax sale, and further provides that such deed shall be *prima facie* evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the State and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be *prima facie* evidence of the regularity of the prior proceedings.
2. TAX DEED—CLOUD ON TITLE.—A void tax deed which the statute does not make *prima facie* evidence of the regularity of the assessment and sale, does not cast a cloud upon the title.
3. TAX SALE—INJUNCTION.—An injunction will not be granted to restrain the collection of a tax, where the deed issued upon a sale for taxes would not cloud the title.

Before Mr. Justice FIELD and SAWYER, Circuit Judge.

The facts sufficiently appear in the opinion of the court.

W. W. Crane, for complainant.

George W. Tyler, for defendant.

By the Court, SAWYER, Circuit Judge. The question in this case is, whether a deed issued by the treasurer of the town of Alameda upon a sale for town taxes under the act of 1872 to incorporate the town of Alameda, would be *prima*

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facie evidence of title, and would, therefore, cast a cloud upon the title. Section 7 of the act is as follows:

“The annual tax authorized by this act to be levied by the board of trustees, shall be levied, assessed and collected at the same time, and in the same manner, as is or may be by law provided for the levying and collecting State and county taxes within the county of Alameda, the treasurer being hereby vested with the same powers to make collections for taxes as is, or shall be, conferred upon tax collectors for the collection of State and county taxes within said county.”

This is the only provision of the act affecting the question. The general provisions of the Political Code relating to the collection of State and county taxes, have no application except so far as they are made applicable by said section seven. The general statute is made applicable, so far as the mode, manner, and time of assessing and collecting the tax is concerned, and the treasurer, with respect to the town tax, is vested with all the powers that are conferred upon tax collectors of State and county taxes by the Political Code, but it goes no further. The town treasurer may sell for town taxes legally levied, and execute a deed in pursuance of such sale, because the tax collector of State and county taxes may do so. The power of the treasurer is spent when he has executed the deed.

Section 7 does not say what the effect of that deed shall be. It does not provide that it shall have any other effect than ordinary deeds executed by public officers upon tax sales. The general act does not stop with authorizing the tax collector to execute the deed prescribed, but goes on in sections 3786 and 3787, to provide, that the deed so executed by the tax collector shall be *prima facie* evidence of title in the grantee as to certain enumerated particulars, and conclusive evidence as to all others. This is something outside and beyond the powers of the tax collector. It is intended to change a rule of evidence—to shift the burden of proof as to the regularity of the proceedings resulting in the tax deed from the claimant *under*, to the party claiming *against*, the tax deed.

Points decided.

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The act under which the tax in question is levied, stops short of the effect of the deed as an instrument of evidence. It says nothing about its effect, but ends with the powers of the treasurer. Without such provision the deed can only have the effect of ordinary tax deeds. The act must be strictly construed, as it assumes to divest title to land *in invitum*. That such is the rule, is clear from the principal authority cited by complainant, *Selby v. Smith*, 2 Mich. 487. In that case the statute, besides the provision that the officers should proceed in the same manner and exercise the same powers as the officers under the general act, adds, "and in all respects, with the like effect." It was upon this clause alone that the title was sustained. (See, also, 1 Blackford, 336; Blackwell on Tax Titles, 449 et seq., and cases cited.) We do not think the deed which the treasurer is authorized to issue, would have the same effect as evidence as a deed executed by the tax collector under the general law. It would not be *prima facie* evidence of title, and consequently would not cast a cloud upon the title. This is settled by numerous decisions in this State. (*Huntington v. Central Pacific R. R. Co.*, 2 Sawyer, 514, and cases cited.) There is, therefore, no ground for an injunction.

Motion for injunction denied.

IN RE AH FONG.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 21, 1874.

1. POLICE POWER.—The police power of the State may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The State may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone.
2. POWER OF STATE TO EXCLUDE FOREIGNERS.—The extent of the power of the State to exclude a foreigner from its territory is limited

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Points decided.

by the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to State control or interference.

3. **TREATY WITH CHINA OF JULY 28, 1868.**—The sixth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China.
4. **FOURTEENTH AMENDMENT OF THE CONSTITUTION.**—The Fourteenth Amendment to the Constitution declares that no State shall deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws: *Held*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police.
5. **STATUTE OF CALIFORNIA CONFLICTS WITH ACT OF CONGRESS.**—On the thirty-first of May, 1870, Congress passed an act declaring that “no tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.” *Held*, 1. That the term *charge*, as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the State, to land within the State depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings; and, 2. That the statute of California, which prohibits foreign immigrants of certain classes, arriving in the State of California by vessel, from landing until a bond shall have been given by the master, owner or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the State in any other way, is in conflict with the act of Congress.

Mr. Justice FIELD, presiding.

APPLICATION for discharge on writ of *habeas corpus*.

The facts are stated in the opinion of the court.

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T. I. Bergin and Leander Quint, for the petitioner.

Thos. P. Ryan, District Attorney of the City and County of San Francisco, and M. M. Estee, contra.

Mr. Justice FIELD: The petitioner alleges that she is illegally restrained of her liberty by the coroner of the city and county of San Francisco, and asks to be discharged from such restraint. The facts of the case, as detailed in the proceedings before us, are briefly as follows: The petitioner is a subject of the Empire of China, and came to the port of San Francisco as a passenger on board of the American steamship *Japan*, owned by the Pacific Mail Steamship Company, and under the command as master, of J. H. Freeman. On the arrival of the steamship at this port, which was on the twenty-fourth of August last, she was boarded by the commissioner of immigration of California, who proceeded, under the provisions of a statute of the State, to examine into the character of the petitioner and other alien passengers. Upon such examination, the commissioner found, and so declared, that the petitioner and twenty-one other persons, also subjects of the Empire of China, arriving as passengers by the same steamship, were lewd and debauched women. He thereupon prohibited the master of the steamship from landing the women, unless he or the owner or consignee of the vessel gave the bonds required by the statute. Neither of the parties designated would consent to give the required bonds, and the women were consequently detained by the master on board of the steamship. They thereupon applied for a writ of *habeas corpus* to a District Court of the State to inquire into the cause of their detention, alleging in their petition its illegality, on the ground that the statute, under which they were held, was in contravention of the treaty between the United States and the Empire of China, and in conflict with the Constitution of the United States, and denying, also, that they were either lewd or debauched women. The District Court granted the application, and heard the petitioners, and after the hearing, remanded them

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back to the charge of the master of the steamship, holding that the statute of California was neither in violation of the treaty nor the Constitution, and that the evidence presented justified the finding of the commissioner, that the petitioners were lewd and debauched women. The petitioners thereupon applied to the Chief Justice of the State for another writ of *habeas corpus*, alleging the illegality of their restraint, on grounds similar to those taken in the petition to the District Court, and also alleging that they were, since the order of the District Court remanding them to the custody of the master of the steamship, about to be forcibly returned to China against their will and consent. They therefore prayed that with the writ of *habeas corpus* a warrant might issue to the sheriff of the city and county of San Francisco to take them into his custody. The Chief Justice granted the writ, returnable before the Supreme Court of the State, and at the same time issued a warrant commanding the coroner of the city and county to take the parties into his custody and bring them before the court.

Under this warrant the parties were taken into the custody of the coroner, and in his custody they still remain. The Supreme Court sustained the ruling of the District Court, and denied the application of the parties to be discharged, holding that the statute of the State, under which they were detained, was valid and binding under the treaty between the United States and China and the Constitution of the United States, and that the evidence justified the finding of the commissioner of immigration as to the character of the women. It therefore made an order directing that the coroner return the parties to the master or owner or consignee of the steamship Japan, on board of the steamship, and requiring such master, owner, or consignee to retain the parties on board of the steamship until she should leave this port, and then to carry them beyond the State.

The order further provided, that in case the steamship Japan was not in the port of San Francisco, the coroner should retain the parties in his possession until the arrival in port of the steamship, and then enforce the order return-

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ing the parties to the vessel, or retain the parties until the further direction of the court.

The petitioner is one of the women thus held by the coroner, and she now invokes the aid of this court to be released from her restraint, alleging, as in the other applications, that the restraint is illegal, that the statute which is supposed to authorize it is in contravention of the treaty with China and the Constitution of the United States, and averring that she is not within either of the classes designated in the statute. It further appears, from the special traverse to the return of the coroner, and it is admitted by counsel, that since the judgment of the Supreme Court, the steamship Japan has sailed from the port of San Francisco, and will not probably return under three months, and that Freeman has been discharged from the service of the steamship company, and is no longer master of the Japan.

The decision of the District Court, and of the Supreme Court of the State, although entitled to great respect and consideration from the acknowledged ability and learning of their judges, is not binding upon this court. The petitioner being an alien, and a subject of a country having treaty relations with the government of the United States, has a right to invoke the aid of the Federal tribunals for her protection, when her rights, guaranteed by the treaty, or the constitution, or any law of congress, are in any respect invaded; and is, of course, entitled to a hearing upon any allegation in proper form that her rights are thus invaded.

I proceed, therefore, to the consideration of the questions presented, notwithstanding the adjudications of the State tribunals.

The statute of the State, under which the petitioner was restrained of her liberty on board of the steamship, is found in the provisions of Chapter I, Title VII, of the Political Code, as amended by the last legislature. These provisions require the master of a vessel arriving at any port of this State, bringing passengers from any place out of the State, within twenty-four hours after its arrival, to make a written report under oath to the commissioner of immigra-

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tion at such port, stating, among other things, the name, place of birth, last residence, age and occupation of all passengers who are not citizens, and whether any of the passengers thus reported "are lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and not accompanied by any relatives able to support them, or are lewd or abandoned women." Then follow the special provisions which have given rise to the present proceeding. They are contained in sec. 2952 of the code as amended. They require the commission of immigration "to satisfy himself whether or not any passenger who shall arrive in this State by vessels from any foreign port or place (who is not a citizen of the United States), is lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become permanently a public charge, or has been a pauper in any other country, or is, from sickness or disease, existing either at the time of sailing from the port of departure, or at the time of his arrival in this State, a public charge, or likely to become so, or is a convicted criminal, or a lewd or debauched woman;" and then declare that "no person who shall belong to either class, or who possesses any of the infirmities or vices specified herein, shall be permitted to land in this State, unless the master, owner or consignee of said vessel shall give a joint and several bond to the people of the State of California, in the penal sum of five hundred dollars, in gold coin of the United States, conditioned to indemnify and save harmless every county, city and county, town and city of this State, against all costs and expenses which may be by them necessarily incurred for the relief, support, medical care, or any expense whatever, resulting from the infirmities or vices herein referred to, of the persons named in said bonds, within two years from the date of said bonds; * * * and if the master, owner, or consignee of said vessel shall fail or refuse to execute the bond herein required to be executed, they are required to retain such persons on board of said vessel until said vessel shall leave the port, and then convey said passengers from this State; and if said master, owner or consignee shall fail or

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refuse to perform the duty and service last herein enjoined, or shall permit said passengers to escape from said vessel and land in this State, they shall forfeit to the State the sum of five hundred dollars, in gold coin of the United States, for each passenger so escaped, to be recovered by suit at law."

The provisions of this section are of a very extraordinary character. They make no distinction between the deaf, the dumb, the blind, the crippled and the infirm, who are poor and dependent, and those who are able to support themselves and are in possession of wealth and all its appliances. If they are not accompanied by relatives, both able and willing to support them, they are prohibited from landing within the State, unless a specified bond is given, not by them or such competent sureties as they may obtain, but by the owner, master or consignee of the vessel. Neither do the provisions of the statute make any distinction between a present pauper, and one who has been a pauper, but has ceased to be such. If the immigrant has ever been within that unfortunate class, notwithstanding he may have at the time ample means at his command, he must obtain the designated bond or be excluded from the State. They subject also to the same condition, and possible exclusion, the passenger whose sickness or disease has been contracted on the passage, as well as the passenger who was sick or diseased on his departure from the foreign port. It matters not that the sickness may have been produced by exertions for the safety of the ship or passengers, or by attentions to their wants or health. If he is likely on his arrival to become a public charge, he must obtain the bond designated, or be denied a landing within the State. Nor does the statute make any distinction between the criminal convicted for a misdemeanor, or a felony, or for an offense *malum in se*, or one political in its character. The condemned patriot, escaping from his prison and fleeing to our shores, stands under the law upon the same footing with the common felon who is a fugitive from justice. Nor is there any difference made between the woman whose lewdness consists in private unlawful indulgence, and the woman who publicly

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prostitutes her person for hire, or between the woman debauched by intemperance in food or drink, or debauched by the loss of her chastity.

A statute thus sweeping in its terms, confounding by general designation persons widely variant in character, is not entitled to any very high commendation. If it can be sustained as the exercise of the police power of the State as to any persons brought within any of the classes designated, it must be sustained as to all the persons of such class. That is to say, if it can be sustained when applied to the infirm who is poor and dependent, when unaccompanied by his relatives, able and willing to support him, it must be sustained when applied to the infirm who is surrounded by wealth and its attendants, if he is thus unaccompanied. If it can be sustained when applied to a woman whose debauchery consists in the prostitution of her person, it must be sustained when applied to a woman whose debauchery consists in her intemperance in food and drink; and even when applied to the repentant Magdalen who has once yielded to temptation and lost her virtue. The commissioner of immigration is not empowered to make any distinction between persons of the same class; and there is nothing on the face of the act which indicates that the legislature intended that any distinction should be made.

It is undoubtedly true that the police power of the State extends to all matters relating to the internal government of the State, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace and safety of society. Under this power all sorts of restrictions and burdens may be imposed, having for their object the advancement of the welfare of the people of the State, and when these are not in conflict with established principles, or any constitutional prohibition, their validity cannot be questioned.

It is equally true that the police power of the State may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; that the State

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may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the State in this respect has its foundation, as observed by Mr. Justice Grier in *The Passenger Cases*, in the sacred law of self-defense, which no power granted to congress can restrain or annul.

But the extent of the power of the State to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to State control or interference. To that government the treaty-making power is confided; also, the power to regulate commerce with foreign nations, which includes intercourse with them as well as traffic; also the power to prescribe the conditions of migration or importation of persons, and rules of naturalization; whilst the States are forbidden to enter into any treaty, alliance, or confederation with other nations.

I am aware that the right of the State to exclude from its limits any persons whom it may deem dangerous or injurious to the interests and welfare of its citizens, has been asserted by eminent judges of the Supreme Court of the United States. Mr. Chief Justice Taney maintained the existence of this right in his dissenting opinion in *The Passenger Cases*, and asserted that the power had been recognized in previous decisions of the court. The language of the opinion in the case of the *City of New York v. Miln*, 11 Peters, 141, would seem to sustain this doctrine. But neither in *The Passenger Cases* nor in the case of the *City of New York v. Miln*, did the decision of the court require any consideration of the power of exclusion, which the State

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possessed; and all that was said by the eminent judges in those cases upon that subject was argumentative and not necessary and authoritative.*

* The only point involved and decided in the case of the *City of New York v. Mills*, 11 Pet. 102, was the constitutional power of the State of New York to compel the master of a vessel with passengers, arriving at her ports, from any country out of the United States, or from any other State of the United States, to report in writing, on oath, to the State authorities, under a prescribed penalty, the name, place of birth, and last legal settlement, age and occupation of every person brought as a passenger in the vessel. This the Supreme Court held that the State, in virtue of her general police powers, had the constitutional right to do. In the course of the opinions of Mr. Justice Barbour and Mr. Justice Thompson, general language is used indicating a power in the State to exclude persons from her limits whom she might deem dangerous to the material or moral welfare of the State, but the language was wholly unnecessary to the decision of the only point then in judgment before the court.

The facts of the two cases known as *The Passenger Cases* (7 How. 283), were briefly these: One of the cases (*Smith v. Turner*) went to the Supreme Court on a writ of error from the Court of Errors of New York. The other case (*Norris v. The City of Boston*) went to the Supreme Court of the United States from the Supreme Court of Massachusetts. The New York case arose substantially upon these facts:

A statute of that State authorized the health commissioner to demand and receive, and in case of neglect or refusal to pay, to sue for and recover of and from the master of every vessel arriving in the port of New York from a foreign port, for himself and each cabin passenger, one dollar and fifty cents, and from the master of each coasting vessel for each person on board twenty-five cents; but coasting vessels from New Jersey, Connecticut and Rhode Island, were only required to pay for one voyage in each month.

The moneys thus collected were denominated in the statute hospital moneys, and the master was authorized to sue and recover from each passenger the amount paid on his account. To the failure on the part of the master to pay within twenty-four hours after arrival of the vessel, was attached a penalty of one hundred dollars. All moneys collected from this source, in excess of the amount necessary to defray the hospital expenses, were to be paid over to the treasurer of the Society for the Reformation of Juvenile Delinquents, in the city of New York.

Upon this statute, Smith, the master of the British ship *Henry Bliss*, was sued for \$295. He demurred to the complaint, on the ground that so much of the statute as authorized a recovery was repugnant to the Constitution of the United States. The demurrer was overruled in the State courts, and electing to stand upon his demurrer, the case was taken to the Supreme Court of the United States, where the point was thus sharply presented to the court for decision. That tribunal, after the most exhaustive and elaborate arguments upon the question, decided that the act of the legislature

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But independent of this consideration, we cannot shut our eyes to the fact that much which was formerly said upon the power of the State in this respect, grew out of the necessity which the Southern States, in which the institution of slavery existed, felt of excluding free negroes from their limits. As in some States negroes were citizens, the right to exclude them from the Slave States could only be maintained by the assertion of a power to exclude all persons whom they might deem dangerous or injurious to their interests. But at this day no such power would be asserted, or if asserted, allowed,

of New York, in the particular case under consideration, was repugnant to the Constitution of the United States, and void, and accordingly reversed the judgment of the Court of Errors of New York.

In the case of *Norris v. The City of Boston*, the facts were substantially as follows: Norris, an inhabitant of St. Johns, in the province of New Brunswick, Kingdom of Great Britain, was master of a vessel belonging to the port of St. Johns; he arrived with nineteen alien passengers at the port of Boston. Prior to landing, he was compelled to pay, under a law of Massachusetts, to the city of Boston, two dollars for each passenger.

The statute of Massachusetts authorized the municipal authorities to appoint examiners, whose duty it was to examine the condition of all passengers on board of any vessel arriving in port. If, upon such examination, there were found among said passengers "any lunatic, idiot, maimed, aged or infirm person," incompetent, in the opinion of the examining officer, to maintain himself, or who had been a pauper in another country, the passenger was not permitted to land, until the master, owner, consignee or agent of the vessel gave to the city a bond in the sum of one thousand dollars, with sufficient sureties, that such lunatic or indigent passenger would not become a city, town or State charge within ten years from the date of the bond, and for all alien passengers, other than those already specified, the master was required to pay two dollars for each passenger before they could land. Appropriate penalties were contained in the statute to secure compliance with its terms. Norris paid the two dollars for each passenger, as prescribed by the statute, under protest, landed his passengers, and thereupon instituted suit for the recovery of the money he had thus been compelled to pay. In the State courts judgment passed in favor of the defendant, when the case was taken to the Supreme Court of the United States upon a writ of error, where the judgment was reversed; that court holding the statute of Massachusetts, under which payment of the money was compelled, was unconstitutional and void.

In the opinions of the justices in these celebrated cases, language is also used as in the case in *11 Peters*, expressive of the right of the State, in exercise of its police power, to exclude persons from her limits; but from the statement of the cases, it is obvious that no such question was before the court. (See note at end of this opinion.)

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in any Federal court. And the most serious consequences affecting the relations of the nation with other countries might, and undoubtedly would, follow from any attempt at its exercise. Its maintenance would enable any State to involve the nation in war, however disposed to peace the people at large might be.

Where the evil apprehended by the State from the ingress of foreigners is that such foreigners will disregard the laws of the State, and thus be injurious to its peace, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties. Gambling is considered by most States to be injurious to the morals of their people, and is made a public offense. It would hardly be considered as a legitimate exercise of the police power of the States to prevent a foreigner who had been a gambler in his own country from landing in ours. If, after landing, he pursues his former occupation, fine him, and, if he persists in it, imprison him, and the evil will be remedied. In some States the manufacture and sale of spirituous and intoxicating liquors are forbidden and punished as a misdemeanor. If the foreigner coming to our shores is a manufacturer or dealer in such liquors, it would be deemed an illegitimate exercise of the police power to exclude him, on account of his calling, from the State. The remedy against any apprehended manufacture and sale would lie in such case in the enforcement of the penal laws of the State. So if lewd women, or lewd men, even if the latter be of that baser sort; who, when Paul preached at Thessalonica, set all the city in an uproar (Acts xvii, verse 5), land on our shores, the remedy against any subsequent lewd conduct on their part must be found in good laws or good municipal regulations and a vigorous police.

It is evident that if the possible violation of the laws of the State by an immigrant, or the supposed immorality of his past life or profession, where that immorality has not already resulted in a conviction for a felony, is to determine his right to land and to reside in the State, or to pass through into other and interior States, a door will be opened to all sorts of oppression. The doctrine now asserted by counsel

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for the commissioner of immigration, if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievous departure from principle.

I am aware of the very general feeling prevailing in this State against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith. If their further immigration is to be stopped, recourse must be had to the Federal government, where the whole power over this subject lies. The State cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws. It is certainly desirable that all lewdness, especially when it takes the form of prostitution, should be suppressed, and that the most stringent measures to accomplish that end should be adopted. But I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure.

By the fifth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868, the United States and the Emperor of China recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to ~~the~~ other, for purposes of curiosity, of trade, or as permanent residents. The sixth article declares that citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may

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there be enjoyed by citizens or subjects of the most favored nation; and, reciprocally, that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation.

The only limitation upon the free ingress into the United States and egress from them of subjects of China is the limitation which is applied to citizens or subjects of the most favored nation; and as the general government has not seen fit to attach any limitation to the ingress of subjects of those nations, none can be applied to the subjects of China. And the power of exclusion by the State, as we have already said, extends only to convicts, lepers and persons incurably diseased, and to paupers and persons who, from physical causes, are likely to become a public charge. The detention of the petitioner is therefore unlawful under the treaty.

But there is another view of this case equally conclusive for the discharge of the petitioner, which is founded upon the legislation of Congress since the adoption of the Fourteenth Amendment. That amendment in its first section designates who are citizens of the United States, and then declares that no State shall make or enforce any law which abridges their privileges and immunities. It also enacts that no State shall deprive *any person* (dropping the distinctive designation of citizens) of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any State deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemp-

tion with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police. And within these limits the act of Congress of May 31, 1870, restricts the action of the State with respect to foreigners immigrating to our country. "No tax or charge," says the act, "shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void." (16 Statutes at Large, 144.)

By the term *charge*, as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being imposed upon any person immigrating to the country which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the Fourteenth Amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and must, if valid, generally lead, as in the present case, to the exclusion of the immigrant.

The statute of California which we have been considering imposes this onerous condition upon persons of particular classes on their arrival in the ports of the State by vessel, but leaves all other foreigners of the same classes entering the State in any other way, by land from the British possessions or Mexico, or over the plains by railway, exempt from any charge. The statute is therefore in direct conflict with the act of Congress.

It follows, from the views thus expressed, that the petitioner must be discharged from further restraint of her liberty; and it is so ordered.

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Opinion of the Court—Mr. Justice Field.

NOTE.—Mr. Justice Wayne, one of the judges composing the majority of the court which decided the Passenger Cases, sums up the conclusions of the court, as follows (7 How. 412):

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question in these cases, conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject, always, to the laws and statutes of the two countries, respectively;" and that said laws are therefore unconstitutional and void.

4. That the Congress of the United States having by sundry acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusetts or New York, and before the passengers have been landed, are in violation of said acts of Congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void; being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations, and among the several States, and to the legislation of Congress under the said power, by which the United States have been laid off into collection districts, and ports of

entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this Court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the Constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another," is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

8. That the power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the States may, in the exercise of such police power, without any violation of the power in Congress to regulate

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Statement of Facts.

commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

THE UNITED STATES v. A. C. WIRT.

DISTRICT COURT, DISTRICT OF OREGON.

SEPTEMBER 29, 1874.

1. INDIANS PRESUMED TO BELONG TO TRIBE.—All Indians born and resident in Oregon are *prima facie* members of some Oregon tribe, and are therefore under the charge of the superintendent of Indian affairs in Oregon, appointed in pursuance of the act of June 5, 1850 (9 Stat. 437), within the meaning of section 20 of the act of June 30, 1834 (4 Stat. 732), as amended by section 1 of the act of March 16, 1864 (15 Stat. 29).
2. IF BORN IN MINNESOTA.—An Indian born in Minnesota is *prima facie* not a member of an Oregon tribe, though he might become such by adoption.
3. ACT ABOLISHING OFFICE INOPERATIVE.—The clause in section 6 of the act of February 17, 1873 (17 Stat. 463), providing for the abolishing of Indian superintendencies after June 30, did not of itself abolish any such superintendency, but only took effect when and as the President designated and appointed.
4. PAYMENT OF SALARY, EFFECT OF.—The payment of a superintendent's salary until September 1, 1873, is *prima facie* evidence that his office was continued until that time, although he was notified that his office was one of those selected under the act to be abolished.

Before DEADY, District Judge.

The defendant was indicted for disposing of spirituous liquor to Indians under the charge of T. B. Odeneal, superintendent of Indian affairs, to wit: Michelle Martineau and William, contrary to section 20 of the Trade and Intercourse Act of June 30, 1834 (4 Stat., 732), as amended by section 1 of the act of March 16, 1864 (15 Stat. 29).

The jury found the defendant guilty of disposing of liquor to William as charged in the indictment, and the defendant moved for a new trial.

Rufus Mallory, United States Attorney.

John F. Caples, for the defendant.

DEADY, J. The ground of the motion for new trial is: 1. That the court erred in charging the jury that the Indian William was under the charge of a superintendent of Indian affairs appointed by the United States, on August 2, 1873; and 2. That the evidence is not sufficient to justify the verdict, because there was no testimony that Indian William was, on the date aforesaid, under the charge of a superintendent of Indian affairs appointed by the United States.

From the evidence it appeared that Martineau was born in Minnesota, of a half-breed Chippeway woman, by a Canadian Frenchman; that on August 2, 1873, and prior thereto, he was living in Clatsop county, and married to a Clatsop Indian woman, and that William was a Clatsop Indian, about 25 years of age, and the step-son of Martineau.

The court charged the jury that any Indian, being a member of any Indian tribe in Oregon, was under the charge of the superintendent of Indian affairs in Oregon, appointed pursuant to section 2 of the act of June 5, 1850 (9 Stat. 437), which authorized the President to appoint such superintendent, "whose duty it shall be to exercise a general superintendence over all Indian tribes in Oregon;" that all Indians born in Oregon are *prima facie* members of one of such tribes, but that an Indian born in Minnesota was not *prima facie* a member of any such tribe, although he might possibly become one by adoption, and therefore they ought to acquit the defendant of the charge, so far as the same related to Martineau, irrespective of the question whether he was an Indian within the meaning of that term as used in the intercourse act.

By section 6 of the act of February 18, 1873 (17 Stat. 463), it is provided:

"That after June 30, 1873, the offices of four of the superintendents of Indian affairs, and of the clerks of such superintendents, are hereby abolished; * * * and the President may assign the remaining four superintendents to jurisdiction over such agencies as he may deem proper, or, in his discretion, dispense with any, or all, of the said superintendents and their clerks."

At the passage of this act, T. B. Odeneal was superin-

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tendent of Indian affairs for Oregon. On June 28, 1873, he received a communication from the department informing him that his superintendency was one of the four selected by the President to be abolished under this act, but he was paid his salary until September 1; and in the meantime received a communication from the commissioner of Indian affairs concerning the selling of liquor to these Clatsop Indians, and was otherwise, during this time, addressed by the inspector of Indian affairs and the department as superintendent.

Upon these facts, the court instructed the jury, as a matter of law, that Indian William was under the charge of Odeneal as superintendent of Indian affairs, on August 2, 1873.

Judicial knowledge extends to the public and private acts of the executive of the United States. The evidence upon this point was therefore addressed to the court and it instructed the jury as to the fact.

Counsel for defendant insists that the office of superintendent for Oregon was abolished after June 30, by operation of the act aforesaid, and that, in any view of the matter, it was then abolished by the action of the President, as shown by the communication received from the department on June 28; therefore the ruling was erroneous and a new trial ought to be granted.

The act of Congress, although it declares in so many words that "the offices of four of the superintendents * * are hereby abolished," of itself could not produce that effect, because it does not mention or indicate any particular four superintendents. In the nature of things the act could not take effect as to any particular superintendency until the President so declared. If he had taken no action in the premises, the act would have remained inoperative and without effect, for uncertainty. Until the President gave effect to it by assigning "the remaining four superintendents" to particular "agencies," and thereby impliedly indicating the four whose offices were to be abolished, or until he dispensed "with any or all of said superintendencies," none of them were abolished.

Points decided.

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The execution of the act was by its terms committed to the President. If he did not abolish the office in Oregon, Odeneal remained superintendent of Indian affairs. The only question is, was he continued in office until September 1? The payment of his salary until that date is itself *prima facie* evidence of the fact. It is not to be presumed that his salary was paid for two months after he was out of office. Then, there are the other circumstances pointing to the same conclusion.

The motion for new trial is overruled.

JOHN D. PATTERSON v. THOMAS J. TATUM.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 28, 1874.

1. FIVE HUNDRED THOUSAND ACRES GRANT TO STATE.—The grant to the State by the act of Congress of September 4, 1841, of 500,000 acres, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at the date of the selection be reserved from sale by any act of Congress or proclamation of the President. When the selection and location are once made pursuant to the State's directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent. The patent takes effect by relation as of the date of the selection.
2. COMMISSIONER OF LAND OFFICE, DUTIES.—The commissioner of the general land office is attached to the Department of the Interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The legislation of Congress respecting his office stated.
3. REPEALS BY REVISING ACTS.—The doctrine that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, does not apply when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act.
4. PRESUMPTION AS TO LAND TITLES IN CALIFORNIA.—All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that

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the title is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that State.

5. **PATENT, A GOVERNMENT CONVEYANCE.**—A patent is the instrument by which the government, whether State or National, passes its title; it is the government conveyance. But if the government possesses at the time no title, that fact may be shown in an action of ejectment. The patent is evidence of title, only because government, being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. A court of law is as competent to pass upon the question whether a title existed at the time in the government, as it is whether the title existed in an individual, where the grantor is a private party. The cases where a party must resort to a court of equity for relief against the operation of a patent stated.

Before Mr. Justice FIELD.

This was an action to recover the possession of a parcel of land situated in the county of Stanislaus, and was tried by the court, before Mr. Justice Field, without the intervention of a jury, by stipulation of the parties. The court found for the defendant.

George A. Nourse, for the plaintiff.

C. T. Bolls, and *D. S. Terry*, for the defendant.

Mr. Justice FIELD. This is an action for the possession of certain real property situated in Stanislaus county in this State. The plaintiff claims title to the demanded premises under a patent of the State of California, bearing date February 14, 1871, issued upon a selection of the premises as part of the five hundred thousand acres donated by the act of Congress of September 4, 1841.

The selection was made by the locating agent of the State for the Stockton district, with that of other lands, on the first of May, 1868. A list of the selections was on that day filed by the agent in the United States land office at Stockton. This list was approved by the commissioner of the general land office on the sixteenth of October, 1871, and by the Secretary of the Interior on the eighteenth of the

same month. The title of the plaintiff rests upon the validity of this selection.

The selection covered nine hundred and sixty acres, and objection was taken to the validity of the patent, on the ground that the statute of the State, at the time, prohibited the purchase of more than three hundred and twenty acres by one person. From the views we take of this case, it is unnecessary to pass upon this objection. We, therefore, refrain from expressing any opinion upon it.

The grant to the State by the act of Congress of September 4, 1841, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at the date of the selection be reserved from sale by any act of Congress or proclamation of the President. When the selection and location, as is said in *Doll v. Meador*, 16 Cal. 320, "are once made pursuant to her (the State's) directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent." But whilst affirming the correctness of this adjudication, we add to it what is equally obvious, that when the selection and location are of lands which are reserved from sale and are not subject to location, no title vests in the State, and, of course, none passes by her patent.

The State patent takes effect, by relation, as of the date of the selection, May 1, 1863. The defendant contends, that on that day the lands selected were reserved from sale by acts of Congress passed in 1862 and 1864, and proceedings taken under them. And he produces directions of the land department, to show that the premises had been withdrawn from sale under those acts. Two questions are thus presented, one of fact, whether the lands were thus reserved; the other of law, whether, such being the case, the defendant can set up the fact in this action to defeat the plaintiff's recovery.

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First, as to the question of fact. By the act of July 1, 1862 (12 Stats. 493, sec. 3), Congress granted to the Central Pacific Railroad Company, for the purpose of aiding in the construction of a railway and telegraph line across the continent, alternate sections, designated by odd numbers, of public land on each side of the road to the extent of ten miles, subject to certain exceptions; and provided that within two years after the passage of the act, the company should designate the general route of its road, as near as might be, and file a map of the same in the Department of the Interior, and that thereupon the Secretary of the Interior should cause the odd sections within fifteen miles of the designated route to be withdrawn from pre-emption, private entry and sale.

The act of Congress of July 2, 1864 (13 Stats. 358, secs. 4 and 5), amending the first act, increased the grant, so as to include the alternate odd sections to the distance of twenty miles on each side of the road, and extended the time for designating the general route of the road, and filing a map of the same one year beyond the original period, and increased the distance within which the lands should be withdrawn from pre-emption, private entry and sale, when such route was designated and map filed, to twenty-five miles.

The act of 1862 authorized the construction by the Central Pacific Railroad Company of a road and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, on the same terms and conditions upon which the construction of a road and telegraph line was authorized beyond that boundary. The right to construct the road and telegraph line from the city of San Jose to the city of Sacramento, and all the privileges and benefits which the company had acquired under the acts of Congress were, previous to March 3, 1865, assigned by the company to the Western Pacific Railroad Company, a corporation also created under the laws of California, and on that day the assignment was ratified and confirmed by act of Congress. (13 Stats. 504.)

On the twenty-third of November, 1864, the commissioner of the general land office at Washington sent a communication, purporting by its heading to issue from the Department of the Interior, directed to the register and receiver of the land office at Stockton, informing those officers that he inclosed a diagram showing that part of their district embraced within the twenty-five-mile limit of the Central Pacific Railroad, and directing them "to reserve from sale, location, or claims of any kind, the vacant odd sections and parts of sections" within those limits, as shown by that map.

On the twenty-third of December following, the commissioner sent a second communication, also purporting to issue from the Department of the Interior, to the same officers, referring to the previous one of November 23 as transmitting a diagram of the route of the Central Pacific Railroad, *east* from Sacramento city, which passed through their district, and added that he then transmitted a diagram of that part of the *western* division of the road, which was within their district, and that the line of the road and the twenty-five mile limit were indicated by red lines, and informing the officers that the previous instructions sent on the twenty-third of November, as to withholding the public lands from sale within the twenty-five-mile limit of the road eastward, were applied to the western division of the road, and that they would be governed accordingly.

This diagram was received by the register of the land office at Stockton, on the thirty-first of January, 1865. A certified copy is in evidence, and it is admitted that the premises in controversy are odd sections within the twenty-five-mile limit, as designated thereon. The indorsements show that it was made from a map dated October 6, 1854. That map must, of course, have been in the Department of the Interior, as the diagram came from that quarter. It shows on its face the general route of the Pacific Railroad in the western district. Examined in connection with the communication of the commissioner of the general land office, the conclusion is irresistible that a map of the general route of the railroad company was filed in the Department of the Interior by the Pacific Railroad Company, as required by

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the act of Congress, and that it was accepted and acted upon by the Secretary of the Interior in the communication to the register and receiver of the Stockton district.

The position that the communication of the commissioner of the general land office must be treated as the separate act of the commissioner, and not as the act of the Secretary, is not tenable. The statute provides that the Secretary of the Interior, when a map of the route of the road is filed, "shall cause" the lands within the prescribed limits to be withdrawn. It does not require the act of withdrawal to be personally made by the Secretary; the law is complied with if the withdrawal be made by his department; that is, through the officers acting under his general supervision and control. The commissioner of the general land office is attached to the Department of the Interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The act of April 25, 1812 (2 Stats. 716), establishing the general land office, put the office in the Department of the Treasury, and placed the commissioner under the direction of the head of that department. The act of July 4, 1846 (5 Stats. 107), reorganizing the office, provided that the executive duties prescribed by law respecting the public lands should be subject to the supervision and control of the commissioner, under the direction of the President. But the office still continued a part of the Department of the Treasury; and as the President acts in matters belonging to the departments through their respective heads, the immediate supervision over and direction of the commissioner remained with the Secretary after, as previous to, the reorganization.

The proposition of counsel that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, is, undoubtedly, correct. The authorities are numerous to that effect. Two cases recently decided by the Supreme Court of the United States, in addition to those cited by counsel, establish this position: that of the *United States v. Tynen*, 11 Wallace, and that of *Henderson's Tobacco*, in the same volume. But the implication cannot

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arise when the revisory statute itself prescribes its operation upon the previous act; when that is done, no other effect can be given to the revisory act. And such was the case in the revisory act of 1846. It repeals such provisions of the original act as were inconsistent with the new act—none other. The continued direction of the commissioner and supervision over him by the Secretary of the Treasury, acting as in all other cases under the President, as prescribed by the original act, was not inconsistent with anything in the new act. And such was the understanding and practice of the Treasury Department, until the Department of the Interior was established in 1849, when the land office was transferred to that department, and its Secretary was required to “perform all the duties of supervision and appeal” in relation to that office, which had been previously discharged by the Secretary of the Treasury.

The position of counsel that there is no evidence that the odd sections covered by the patent of the defendant were vacant at the time of the reservation in 1865, and therefore they cannot be so regarded in this action, is not entitled to any consideration. If the selections were not then vacant, they were not vacant in 1868, when selected by the locating agent of the State. All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that the title is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation; but it has been expressly declared by statute in that State.

Our conclusion from the evidence is, that the land embraced by the patent to the plaintiff was reserved from sale when selected by the locating agent, as part of the five hundred thousand acres granted to the State, and that such selection was inoperative and void. The approval of the commissioner of the land office and of the Secretary of the Interior, of the list of selections, so far as the list embraced the premises in controversy, was equally inoperative. No

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interest by either proceeding was vested in the State. This result would follow without any legislation to that effect, from the condition annexed to the grant, that the selection must be made from lands not reserved from sale by any law of Congress or proclamation of the President; but, as if to preclude any possible discussion upon the question, the act of Congress of August 3, 1854, providing for vesting the title in the States, of lands certified to them, declares that in all cases where lands are granted by any law of Congress to any State or territory, and the law "does not convey the fee simple title of such lands, or require patents to be issued therefor," the lists of such lands certified by the commissioner of the general land office, where the lands are not of the character embraced by the acts of Congress, and are not intended to be granted thereby, shall, so far as such lands are concerned, "be perfectly null and void, and no right, title, claim, or interest, shall be conveyed thereby." (10 Stat. at Large, 346.)

The donating act of 1841 does not convey the fee simple title to any specific lands, or require patents to be issued therefor; it only vests an immediate right to a specific quantity to be afterwards selected under direction of the State. And should the selection be postponed until after the land is reserved or otherwise appropriated, the interest of the State would lapse and fail. The lands donated to the State are precisely those to which the act of Congress refers when it declares the effect of the list certified by the commissioner.

Second. The lands selected by the agent of the State having been at the time of the selection thus reserved from sale, and the selection being therefore void, the second question arises, whether the defendant can set up this fact to defeat the plaintiff's recovery on the State patent.

The defendant claims title to the demanded premises under patents of the United States, bearing date in March, August, and September, 1873, issued to different parties upon pre-emption settlements made by the patentees on the fifth of July, 1870. On that day the reservation from sale by the proceedings already detailed, was withdrawn, and

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the lands were opened to pre-emption and homestead entries. The defendant claiming under the patents thus issued, has a standing in a court of law, and occupies a position with respect to the property which enables him to assail the title of the plaintiff. The case of *Doll v. Meador*, to which the counsel refers, and upon which he relies to show that the title of the plaintiff cannot be questioned in this action, is a very different case from the one at bar. There the controversy was between the holder of a patent of the State, and a trespasser without title; and it was held that the latter, not being in privity with a common or paramount source of title, was in no position to question the validity of the patent, or the action of the officers of the State by whom the lands were selected. We adhere to every position asserted in that case respecting the efficacy of patents and the conditions upon which they may be assailed. We have had frequent occasion during a somewhat extended judicial experience, to reconsider the doctrines there stated, and upon every reconsideration we have felt renewed confidence in their soundness. But they cannot be applied to a case entirely dissimilar in its facts, where the assailant of the plaintiff's patent comes clothed with a patent of the United States, of equal dignity, and equally entitled to every presumption in favor of its validity.

A patent is the instrument by which the government, whether State or National, passes its title; it is the government conveyance. But, if the government possess at the time no title, none passes by its execution. It is of itself evidence of title, only because government being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. But, if an earlier patent is produced, the subsequent one ceases to have any operation. The title passing by the first conveyance is not affected by the second until the first is got out of the way. If the first was issued from improper motives, corrupt actions, erroneous views of duty, or mistaken considerations, as to matter of fact or law by the officers of the government to whom the execution and issue of patents is intrusted, a court of law can

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afford no remedy to the second patentee; he must resort to a court of equity for relief. So, also, if particular facts respecting the condition or location of the property must be previously ascertained and determined by a special tribunal appointed for that purpose, and that tribunal has come to erroneous conclusions upon which the patent has issued, such conclusions cannot be questioned collaterally, and the patent be thereby invalidated in the action of ejectment. Relief in such cases can only be afforded by a direct proceeding by bill, information, or *scire facias*, either to revoke the first patent, or restrain its operation, or to subject, where equitable grounds exist, the land to certain trusts in the first patentee's hands. A court of law in an action of ejectment cannot listen to any objections founded upon such considerations. But where the action of the officers in the execution and issue of the patent, or the correctness of the conclusions of the special tribunal is not assailed, but the objection to the patent reaches beyond such action and conclusions, and goes to the existence of a subject upon which such officers or tribunal could act, that is, to the title in the grantor, no such difficulty exists in its consideration in a court of law. That tribunal is fully competent to pass upon the question whether a title existed at the time in the government, as it would be whether the title existed in an individual where the grantor is a private party.

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In *Polk's Lessee v. Wendall*, 9 Cranch, 87, the question was considered as to how far in a court of law inquiries tending to impeach a patent could be considered, and it was observed that the laws for the sale of public lands were intended to secure the regularity of grants, and to protect the incipient rights of individuals and the State from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty, and that when all the proceedings were completed by a patent, a compliance with the rules was presupposed. It would, therefore, be extremely unreasonable, said the court, to avoid a grant for any irregularity in the conduct of officers appointed by government to supervise the progressive course of a title, from its commencement to its consumma-

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tion in a patent; but that the great principles of justice and law would be violated, did there not exist some tribunal to which an injured party might appeal in which the means by which an elder title was acquired, might be examined, and that in general a court of equity was a tribunal better adapted for the purpose than a court of law. "But," adds the court, "there are cases in which a grant is absolutely void, as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." In *Patterson v. Winn*, 11 Wheaton, 381, the Supreme Court refers to this case, and after giving a brief summary of the positions we have stated, says: "We may therefore, assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But, in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent."

This doctrine was recognized in *Doll v. Meador*. The court, after referring to a previous case, and observing that a patent issued by the government for any land not embraced in the grant to the State, would, undoubtedly, be void, for want of power to convey, said: "We do not question this proposition; we affirm it as sound. The point here is, as to the *status* of the party who can raise any question as to its validity, when it is regular on its face. Nor do we question the further proposition, that the defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the act of Congress, or was within the exceptions contained in the act of this State. We only annex to the proposition the qualification, that to do this, he must first have brought himself in some privity with the common source of title. If he was a mere intruder, not possessing any claim of title, either from the general or State government, he would not be in a position to question the regularity and correctness

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of the action of the officers of the State, in the selection of the lands or the issuance of the patent."

Nor is there anything in the language of the court, in *Leese v. Clark*, 18 Cal. 535, which militates against these decisions. There a patent issued upon a confirmation of a Mexican grant, was under consideration. The United States had stipulated, in the treaty by which California was acquired, to protect its inhabitants in their property, and, in the execution of the obligation thus created, had established a special tribunal to examine all claims to property which parties asserted they possessed upon the transfer of jurisdiction from the former government. Numerous proceedings were required to be taken before this tribunal and in execution of its decrees, and where its adjudication was favorable to the claimant, a patent was directed to be issued to him. A patent thus resting upon the judgment of a special tribunal was something more than an ordinary conveyance of the government. It was an official declaration that the grant to the claimant was of such a character at the date of the cession of the country, that it was entitled to recognition and confirmation by the United States. And so the court very justly used the language which counsel cites, that upon all matters of fact and law, essential to authorize its issue, the patent imported absolute verity. And what were those matters of fact and law? These only; that the claimant had a valid grant at the date of the cession, that is, a genuine grant issued by the former government, which, was entitled to confirmation under the treaty and the laws made to carry its stipulations into effect, and that by subsequent proceedings the claim of the grantee had been definitely located by an official survey. The whole proceeding resulting in the patent was one between the government and the claimant; it bound them until vacated by direct proceedings instituted for that purpose, and, of course, all parties in privity with either by title subsequent. But, if before the grant thus confirmed had issued, the title had passed from the Mexican government, the patent notwithstanding all the formality of the various steps preceding its issue, would have created no interest in the patentee. Such previous

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transfer of title, supposing always that the transfer had been judicially recognized and confirmed, could be set up in an action at law against the patent, without assailing the regularity of the proceedings of the land commissioner, or of the officers of the United States, in the survey and location of the land. Such previous transfer being established, would not make the patent void, but, like a prior conveyance of the same property, would render it inoperative.

We do not think the judgment in the previous action between the same parties can be deemed an adjudication estopping the defendant from setting up his title and questioning the validity of the plaintiff's patent. When the first action was tried the defendant had not acquired the title of the government by his patent, and was therefore in no position to assail the plaintiff's patent. Such, at least, was the ruling of the court, which must be regarded, whether correct or otherwise, as the law of that case.

It follows, from the views we have expressed, that the law is with the defendant, and judgment must therefore pass in his favor; and it is so ordered.

THE SHIP INVINCIBLE,

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 14, 1874.

CARRIER—NEGLIGENCE—Although the carrier is exempt from liability for damage or deterioration arising from the nature of the goods or of the voyage, yet, if there has been a want of proper care or skill on his part in guarding against such damages, the injury will be ascribed to his negligence.

Before HOFFMAN, District Judge.

McAllisters & Bergin, proctors for libellant.

E. Casserly and W. H. L. Barnes, proctors for claimants.

HOFFMAN, J. In the spring of 1864 the libellants shipped on board the *Invincible*, then lying at the port of New York,

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and bound on a voyage to San Francisco, 750 baskets of champagne in two lots, one of 500 baskets and the other of 250. By the terms of the bills of lading given for the first lot, the wine was to be stowed in the house on deck. The second lot was to be stowed in the cabin staterooms and house on deck. Under these contracts 659 baskets were placed in the house on deck and the remainder in the cabin staterooms.

On the arrival of the ship the wine stowed in the staterooms was found to be in perfect order. But that stowed in the house was damaged to the extraordinary and almost unprecedented extent of 57 per cent. of its entire value. At the hearing the carrier, after proofs of this loss had been given, attempted to excuse himself by showing that the house on deck was an unfit place for the stowage of goods, and that goods so placed were exposed to extraordinary perils to which cargo below decks was not liable. Although it appeared that the voyage was somewhat rough and boisterous, the claimants failed to show that the injury to the goods was attributable to the direct operation of any peril of the sea, in the strict sense of the term, but he established beyond doubt that the loss of the wine was caused by what is known as "blowage and breakage"—that is, escape of the contents of the bottles, either through their mouths or by their bursting.

He thus proved *prima facie*, that the injury was occasioned by natural causes, arising from the inherent qualities and perishability of the goods themselves and the nature of the voyage. To this the libellants replied that the damage was excessive and unprecedented, and that it could not be ascribed to the intrinsic infirmity of an article which is every year brought to this port in enormous quantities without serious loss. Some other cause for the injury must therefore be sought for, and this was to be found in the total neglect of the master during the entire voyage to give to the wine proper and necessary ventilation by opening, as occasion permitted, the doors and windows of the house. That through this omission the temperature of the house became

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so high as to cause the wine to "blow" and the bottles to burst.

It is not pretended on the part of the carrier that any effort whatever was made to ventilate the goods during the voyage by opening the windows or doors of the house.

The master seems to have considered it his right and his duty to leave the goods and the house which contained them, in the same condition during the voyage as when they left New York, and this, though apprised by the leakage of wine through the scupper holes of the house for a considerable period, that the goods from some cause were sustaining great injury.

The answer sets up that the excessive heat arose upon the decomposition or fermentation of the straw in which the bottles were packed, caused by its being wetted with salt or fresh water.

But the evidence fails to sustain this allegation. No noticeable accident happened to the deck-house during the voyage. The chemical experts failed to detect in the straw when examined here, any trace of the presence of salt, or to discover any signs of chemical changes which could have generated excessive heat.

But even if the heat was due to this cause, it was as much the duty of the carrier to endeavor to mitigate its effects by opening the doors and windows of the house, as to resort to the same expedients to diminish heat caused by the sun's rays. Whether his omission to do so was negligence for which he is liable, is the real point of the case.

The answer also alleges that the champagne in question was a spurious article of inferior quality, and the loss arose from its inherent perishability caused by "defective manufacture, preparation, bottling, corking and packing."

In support of these allegations no proof whatever is offered, save that a few of the baskets were somewhat rat-eaten.

The wine was the "Charles Heidseck Champagne," so well known and extensively used in this country, and does not appear to have differed in the mode in which it was manufactured, prepared, bottled and corked, from the wine

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which the libellants, whose commercial house is of the highest respectability, have for years been in the habit of importing.

The fact that all the wine stowed in the cabin arrived in perfect order, would seem to afford decisive proof that there could have been no such defective preparation and packing as the answer alleges.

The whole evidence points, I think, unmistakably, to the conclusion that the blowing and breaking of the bottles was caused by the excessive heat to which they were subjected by being stowed, during the whole of a voyage in which the equator was twice crossed, in a deck-house, tightly closed and exposed on its roof and sides to the direct and reflected rays of the sun.

The question is thus presented, was the omission on the part of the master to cool and ventilate the deck-house by opening its doors and windows when the weather permitted, negligence for which the vessel is liable?

The libellants contend that was he bound to do so by express stipulation, and by his general duty as a carrier—especially when apprised by the leakage of the vessel that the wine was sustaining serious injury. The claimants excuse their omission on the grounds:

1st. That by express agreement the goods stowed in the deck-house were to be at the sole risk of the shipper, and the ship was in no case to be liable for any injury that might befall them.

2d. That the doors and windows were closed and fastened with the full knowledge of Mr. Cresby, the shipper, and with the understanding that they were so to remain during the voyage.

3d. That it was impracticable to open the doors and windows without exposing the goods to injury from salt or fresh water or from the depredations of the crew, and that it was not the duty of the carrier, nor had he the right to meddle in any way with cargo stowed under the supervision and by direction of the shipper.

1. In regard to the alleged agreement, Mr. Hastings, part owner of the ship, testifies that he consented with much

reluctance and at Mr. Crosby's earnest request, to the stowage of the wines in the deck-house, and that it was the express understanding that the ship should assume no responsibility and incur no liability "of any name or nature." That the carpenter and stevedore were to fit up the house and stow the goods as Mr. Crosby should direct, and that thereafter the goods were to be at the sole risk of the shipper. In these statements Mr. Hastings is corroborated by Deane, the ship-keeper. Mr. Crosby denies that any such agreement was entered into.

The disputed matter of fact I do not deem it necessary to determine. If the agreement was as broad and absolute as is alleged, parol testimony to prove it was inadmissible, for it is inconsistent with and contradictory to the written stipulations of the bill of lading. Nor if reduced to writing would its legal effect be to exonerate the carrier from the consequences of his actual negligence. The policy of the law will not permit a common carrier to stipulate for exemption from responsibility for the negligence of himself and his servants. (*R. R. Co. v. Lockwood*, 17 Wall. 357.)

Whether there was in this case actual negligence is the very question at issue.

2. The alleged understanding with Mr. Crosby that the doors and windows of the deck-house should be tightly closed and so remain during the voyage, was, if made, unquestionably binding on him.

An agreement between the parties as to the degree and kind of attention and care to be bestowed on the merchandise during the voyage, in no degree contradicts or varies the obligations of the bill of lading. It merely establishes by mutual consent what shall be accounted, under the circumstances of the case, due care and diligence.

The proofs of this agreement rest on the depositions of Mr. Hastings and Mr. Deane.

The testimony of these witnesses, with regard to the release of the ship from all responsibility for the goods, "of every name and nature," has already been noticed.

Mr. Hastings testifies in addition: "Mr. Crosby never said one word to me about ventilation of any name or

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nature. Never raised the question and never mentioned the word ventilation.

"I know that the windows and holes in the top of the house were stopped up by Mr. Deane at Mr. Crosby's request.

"The doors were locked and fastened with screws. Mr. Deane, the carpenter, fastened them. Mr. Crosby was there at the time and saw they were fastened, and expressed himself perfectly satisfied with the stowage and everything appertaining to his wine. Mr. Crosby was present at the fastening. I told him the captain said that without their being fastened the locks would be no protection against the crew. I further said I did not think it would be seaworthy and might vitiate his insurance, as all policies required the hatches to be fastened securely down and made impervious to wet."

Mr. Hastings further states that the only reason assigned by Mr. Crosby for not wishing to stow his wine between decks, was the danger of injury by moisture or sweat.

Mr. Deane corroborates, in a very positive manner, Mr. Hastings's statements.

He testifies to Mr. Hastings's reluctance to allow the goods to be stowed in the deck-house, and to his positive and repeated declarations to Mr. Crosby "that he would take no risk whatever—neither from sailors, heat of galley nor heat of the sun upon the top of the house."

He also testifies that the windows were boarded over by Mr. Crosby's direction; that when the goods were all stowed Mr. Crosby told him to fasten the doors with screws or nails, and that he would take all the risk if he (the witness) would fasten up the doors and windows as directed. The credibility of this witness is somewhat impaired by his evident anxiety to shield the vessel from liability. He iterates and reiterates, on almost every page of his deposition, that Mr. Crosby expressly assumed the whole risk of the adventure, and released the ship from all liability, being apparently under the impression that such an agreement would be decisive of the suit.

Mr. Crosby's testimony is substantially as follows:

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That about the middle of March, 1863, "he made a verbal agreement with Mr. Hastings for stowage of the champagne in the deck-house. That it was to be ventilated and protected from heat when at sea, and during the voyage, by keeping the doors and windows of said deck-house open. Mr. Hastings replied that he would do anything I required, to secure ventilation of the champagne. * * *

"I directed Mr. Hastings to have strips of boards nailed or fastened across the doors a few inches apart on the inside of the deck-house, to secure the wine from falling out when the doors should be opened for ventilation. He replied that it should be done, and called the carpenter and requested me to give directions to him."

In reply to the ninth interrogatory he states, after repeating the verbal agreement with Mr. Hastings, above detailed, that the latter proposed putting in an iron ventilator, but that he told him he considered it of no importance—that the doors and windows would afford a free circulation of air, and was the ventilation he wanted, which Mr. H. agreed to furnish.

He further states: "I had no knowledge whatever of the fastening and boarding of the windows or the fastening and caulking of the doors of the deck-house."

The testimony on this turning-point of the case is thus found to be irreconcilably conflicting.

Neither of the witnesses was examined in court. Their testimony was taken by deposition. They are both believed to be merchants of wealth and respectability.

The duty of determining which of them is to be believed is delicate and unpleasant. I shall briefly state the considerations upon which my determination is founded:

Several years previous to the shipment by the *Invincible*, the attention of the libellants, who were largely engaged in the business of importing champagne into this State, had been drawn to the very serious losses sustained by the goods during their transit. After much consideration they came to the conclusion that ventilation, and a free circulation of air, were indispensable to the preservation of the wine. They therefore determined to ship in the cabin and deck-

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house exclusively, and this mode they had pursued for six years previous to the shipment in this case. The results were of the most satisfactory character. The losses which had previously been so great as to create apprehensions that they would be compelled to relinquish the business became almost nominal. Mr. Dibblee states that out of 18,000 baskets imported during five years, and stowed on deck, the percentage of loss by breakage was less than one-half of one per cent., and by blowage less than one per cent.

The clerk of the libellants gives the exact figures taken from their books: Total loss on 18,602 baskets champagne, imported on sixty different vessels (exclusive of the nominal), 245 baskets; 169 by blowage, 76 by breakage.

Nor was this practice confined to the libellants alone. It appears in evidence, and is admitted by the claimants' witnesses, whose testimony was taken in New York, that it is the general practice of shippers of champagne wine to require that it be stowed in the cabin or house on deck, and that such is the usual mode of carrying it.

Under these circumstances, it has appeared to me incredible that Mr. Crosby, while accepting the increased risk of sea damage incidental to stowing the goods in a deck-house, should have renounced the only possible benefit or advantage which he could expect from that mode of stowage; should have consented that the easy and efficient means of ventilation afforded by the deck-house should be wholly neglected, and that the goods should remain during an entire voyage, in which the tropics were to be crossed twice, in a room with windows closed, and doors fastened and caulked, and exposed to a temperature which, as one of the witnesses remarked, would be like that of an oven.

The proofs disclose a fact which affords an important corroboration of the conclusion derived from *a priori* considerations.

Mr. Crosby states he requested that slats should be nailed on the inside of the door-ways to prevent the wine from falling out when the doors should be opened. This, Mr. Deane informs us, was in fact done by Mr. Hastings's order.

He omits to state the reason for doing it. But what reason can be assigned, save that stated by Mr. Crosby? And can the fact that Mr. Hastings gave orders for the purpose, be reconciled with the supposition that he did not expect that the doors would be opened at all during the voyage?

I think these considerations are decisive, and that it may be concluded with tolerable certainty that Mr. Crosby did not expressly or by implication agree to renounce the advantages to be derived from the mode of stowage, on which he insisted, or relieve the carrier from his obligation to exercise reasonable care and diligence for the security and preservation of the goods during the voyage. I also think that Mr. Crosby expressly stipulated for the employment during the voyage, of means of ventilation which the deck-house afforded, whenever those means could reasonably and properly be used.

But if this last proposition be deemed not to have been satisfactorily proven, I will briefly consider whether, in the absence of express stipulation, it was not the carrier's duty, under the circumstances of this case, to secure the safe transportation of the goods by the employment of the means which Mr. Crosby states he expressly promised to adopt.

That under the common bill of lading the carrier is exempted from liability, not only for loss by perils of the sea, but also for damage or deterioration arising from the nature of the articles or the voyage, is not disputed.

But if there has been a want of proper care or skill on his part in guarding against such dangers, the damage will be ascribed to negligence and not to the perils of the sea, or the nature of the articles or voyage. (*Lamb et al. v. Parkman*, Sprague's Dec. 343.)

"It is the master's duty, as representing the ship owner, to take reasonable care of the goods intrusted to him, not by merely doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage; but, also, by taking reasonable measures to check and arrest their loss, or deterioration, by reason of accidents, for the necessary effects which there is by reason of the ex-

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ception in the bill of lading no original liability." (*Notara et al. v. Henderson et al.*, IV. Mar. Law. Cas., p. 281.) In this case the carrier was held liable for the neglect of the master to take reasonable care (by drying them), of beans which had been wetted by a peril of the sea.

So in the case of "The Bark Gentleman," Olcott's Rep., 110, it was held culpable negligence in the master to have omitted to take proper means for the preservation of a cargo of hides by beating, or ventilation, during a detention of the vessel for thirty days at the Cape de Verde Islands by reason of unseaworthiness.

What is the reasonable care which the master must exercise will depend upon the circumstances of the case; and the question under consideration is: Did the failure of the master to take any measures whatever to prevent or arrest damage to the goods, caused by the heat to which they were exposed, constitute a want of reasonable care on the part of the carrier? A large number of witnesses testify that it is neither usual, safe, nor proper to open the windows and doors of a deck-house for the purposes of ventilation, and that to do so would expose its contents to danger from seawater, from rain, and from the depredations of the crew.

On the part of the libellants many witnesses testify precisely the reverse. I have not ascertained by counting, on which side the witnesses are the more numerous. As to the comparative weight to be given to their testimony, there can be, I think, no room for doubt.

The experience of any one who has sailed in tropical latitudes is sufficient to apprise him that for a large part of the time the doors and windows of a house on deck may be kept open with no appreciable danger of damage to its contents by fresh or salt water. The houses commonly contain rooms used as a galley, a carpenter's shop, a sail-room, and often a fore-castle for the crew, and a steerage for passengers. The uses to which these rooms are applied renders it indispensable that the doors and windows should be frequently if not constantly open.

They can be readily closed at a moment's notice. The fact that the houses are constructed with windows would

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seem to indicate that the latter are intended to be used and used with safety, and the pretension that it would have been imprudent or improper to open them during any part of a voyage, in which the tropics were twice traversed, appears to me repugnant to common experience and common sense.

The danger from the depredations of the crew, to baskets of wine, by opening in the daytime the doors and windows of a room where the doorways have slats nailed across them on the inside, and the windows are protected by rods, seems to me wholly imaginary.

I think it clear that in this case it was the obvious duty of the master to use the efficacious means at his disposal to prevent or check the damage which the goods might sustain from natural causes, and that to relieve him from that duty he must establish by a preponderance of proofs, that the shipper dispensed with its performance. This, he has, in my view of the evidence, failed to do. The ship is, therefore, liable for his neglect.

I have not found it necessary to pass upon the questions whether certain notes of counsel, offered as substitutes for depositions which have been lost, are admissible in evidence, as my determination of the case would not be affected by their reception or rejection.

At the hearing, the arguments of counsel were directed exclusively to the question of liability of the vessel. The amount of loss was not discussed.

I have not been able exactly to ascertain it from the evidence. Although it is probable that the data for its computation are contained in the proofs.

It will therefore be referred to the clerk to ascertain and report the amount of damages, unless the parties can fix it by agreement.

P. M. S. Co. v. TEN BALES GUNNY BAGS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 23, 1874.

SALVAGE.—Sixteen thousand dollars awarded as salvage compensation, where both vessels belonged to the same owners.

Before HOFFMAN, District Judge.

McAllisters & Bergin, for libellants.

Milton Andros, for claimant.

HOFFMAN, J. About one o'clock in the afternoon of March 15, 1874, as the steamer Colima was prosecuting her voyage from Panama to this port, a sudden jar or shock was felt, followed by the immediate stoppage of her engines. On examination it was found that three blades of her propeller were broken, and that her steam motive power was, in consequence, unavailable.

Sail was at once made upon the ship and she was headed for the land. About six in the evening she came to anchor under Cerros Island, distant southerly from the port of San Diego, about 292 miles, and from Cape St. Lucas, northerly, about 420 miles. An officer was immediately sent ashore to hoist a signal of distress on the island, and in the morning a boat was dispatched for San Diego with instructions to intercept and send to the assistance of the Colima, any steamer that might be fallen in with, or, in case none was met, to proceed to San Diego and communicate by telegraph with the agents of the Pacific Mail Steamship Company, at this city. On the succeeding day another boat was despatched southward to Cape St. Lucas with similar instructions as to any steamer which might be met.

The latter, after a navigation of several days, fell in with the steamship Arizona, bound for San Francisco, and the master, on learning the situation of the Colima, proceeded without delay to Cerros island, where he arrived on the morning of the twenty-fifth. Preparations were at once

made for towing the Colima, and on the evening of the same day the vessels started for this port, where they arrived on the morning of March 30. The distance from Cerros island to San Francisco is about 730 miles. The voyage of the Arizona was lengthened by her entering upon the service some two and a half or three days.

Her deviation was not considerable, as the usual course of steamers along the coast is, in fine weather, not far from the island, and such was in fact the position of the Colima when the accident occurred.

Both vessels belonged to the same owner, the Pacific Mail Steamship Company, and the present suit is brought against a portion of the cargo of the Colima for a salvage compensation, with the understanding that the court shall determine the whole amount of salvage, if any, to be paid by the cargo; such amount to be afterwards apportioned amongst the shippers, according to their respective interests.

The cause of the accident is somewhat obscure. On examination here, it was found that out of the four blades of her propeller, three were entirely gone, and of the fourth one-half remained.

The external appearance of the casting indicated no defect, but on close inspection of the iron at the place of fracture it was found to be slightly porous or honey-combed, showing an original defect in the manufacture. The experts testified that they knew of no test by which this defect could have been detected.

The vessel, with the same propeller, had very recently made a voyage from New York to this port without accident. She had then proceeded to Panama, and had accomplished about three-quarters of her return trip, when the accident occurred. At the time it happened, the sea was calm and the weather moderate. The vessel was going at her usual rate of speed.

That the defect in the casting impaired the strength of the propeller is obvious, but whether sufficiently so to account for its breaking under the circumstances, the engineer was unable to form an opinion.

If the defect was such as to render the vessel unseaworthy

from the time she was built, it is difficult to understand why it did not sooner disclose itself; on the other hand, if it was not, it is equally difficult to account for the accident. No rocks or other objects upon which the propeller might have struck are known to exist in the part of the ocean where the accident occurred. The advocate for the claimant contends that the accident was caused by a latent defect in the means employed by the carrier, the consequences of which the law requires him to bear. That this defect constituted a breach of his implied warranty of seaworthiness of the ship, and that as the carrier and the salvor are the same corporation, he cannot recover as salvor a compensation from the shipper, which he would, as carrier, be obliged to reimburse.

In the view I take of this case, it is unnecessary to determine whether the accident was solely caused by the defect in the propeller, and whether that defect was such as to render the vessel unseaworthy, and the carrier liable for its consequences under the rules of the common law by which the liabilities of carriers are determined.

The cargo of the Colima was shipped under bills of lading which provided, among other things, that the vessel should not be liable "for accidents, loss and damage from machinery, boilers and steam, or from accidents or perils of the seas, or of land and rivers, or of sail or steam navigation, of whatever kind or nature whatsoever."

Although these stipulations would not avail to exonerate the carrier from liability for damages caused by his actual negligence, yet, if they are to have any force at all, they must exempt him from liability for the consequences of a secret defect which no diligence could discover or guard against, and where the previous history of the vessel afforded the strongest grounds for the belief that it could not exist. The point was expressly ruled in the case of *The Miranda* (IV. Mar. Law., Cas. 440), after extended argument.

That case bears in all its details so striking a resemblance to the cases at bar, that if its authority be admitted, it is decisive on every point raised in the latter. The *Miranda*, like the *Colima*, became disabled at sea by an accident to her machinery, and was towed into port by the *Roxana*, a

vessel belonging to the same owners. The value of the property was considerable, and service occupied about two days. The owners of the Roxana claimed salvage on the cargo of the Miranda. It was contended for the defense: ‘

1. That the owners of the Roxana were bound to carry and deliver the cargo laden on board the Miranda, to London. That they would not have fulfilled this contract unless they had rendered assistance to the Miranda, and that this assistance must therefore be considered as an act done for the sole benefit and advantage of the owners of the Roxana.

2. That implied in the contract between the owners of the Roxana and the owners of the cargo of the Miranda, there was a warranty of the seaworthiness of the Miranda. That the accident arose from the breach of such warranty. And that the owners of the Roxana were therefore liable for all the consequences of such breach, and so were not entitled to salvage remuneration for averting a loss which, if it had happened, would have fallen on themselves.

Both of these defences were overruled. As the first was not insisted on at the argument of the cases at bar, it is unnecessary further to advert to it. The state of facts under which the second defence was interposed, was identical with those in the case of the Colima.

The shaft of the Miranda broke in fair weather and without any assignable cause, except a latent defect existing at the commencement of the voyage. The bill of lading contained a clause exempting the vessel from liability for non-performance of the contract, caused by “*accidents, or damage from machinery, boilers and steam.*” The terms of the bills of lading in the cases at bar are “*accidents, loss and damage from machinery, boilers and steam.*”

As to the nature of the exemption thus created, Sir R. Phillimore, delivering the judgment of the court, said:

“But I think the true question in the case is, does the exception ‘*accidents from machinery,*’ include the present case? I must come to the conclusion that the accident in question finds its place among the excepted perils; it is, therefore, unnecessary for me to discuss the able argument

which has been addressed to the court with respect to a warranty of seaworthiness being implied in the contract."

The libellants in the case at bar being thus found not to be liable as carriers for the consequences of the accidents to the machinery, they are entitled to claim as salvors a reasonable compensation for their service to the cargo. The amount to be allowed will be determined on a consideration of all the circumstances.

The Colima, at the time she was taken into tow by the Arizona, though not in immediate peril, was in an exposed and somewhat dangerous position. If a gale from the south or southeast had suddenly arisen, she would, in all probability, have gone ashore. And even if it had come on gradually there is some doubt whether she would have been able to put out to sea. Capt. Lappidge is of opinion that she could not have done so; but this opinion involves the supposition that her master voluntarily put her in a position from which it was impossible with any wind to extricate her. I incline to think, therefore, that under favorable circumstances she might have succeeded in getting to sea. She would thus have avoided an impending shipwreck, but she would not have secured her final safety—nor the accomplishment of her voyage. With the winds which prevail at that season of the year, an attempt to reach San Francisco by the use of her sails would have been hazardous—it could, if practicable at all, have been accomplished only after a protracted voyage, before the expiration of which her provisions would have been exhausted. She had on board 285 passengers and the ship's crew.

The entire cargo was destined for San Francisco. Its delivery at the earliest practicable moment was, no doubt, of great importance to its owners. To reach its destination at all it must either have been transhipped, or the vessel on which it was laden must have been towed up, as was in fact done, and by this means it arrived after a detention far less than would otherwise have been incurred.

All these ingredients constitute a meritorious salvage service, from which the owners of the cargo have derived great benefit.

“On the other hand, I must remember” (applying the language of Sir. R. Phillimore, in the *Miranda*, *mutandis mutatis*, to this case), “that the Colima was owned by the owners of the Arizona; that the owners of the Arizona were earning freight for the carriage of the cargo of the Colima; that no material deviation occurred to the Arizona as she towed the Colima to the port to which she was herself bound. I must also bear in mind that the weather was, with some inconsiderable exceptions, fine, and that there was no appreciable danger.”

It must also be remembered that San Francisco was the only port on the coast where the Colima could be repaired, and that for that purpose she must necessarily have been towed thither. The interest of the owners as well as regard for the safety of the passengers, would have required them to accept the services of the Arizona, even if there had been no cargo on board.

Another consideration is, I think, entitled to much weight. The Pacific Mail Steamship Company is the owner of a fleet of steamships plying regularly between this port and Panama.

Except when they avoid the land during fogs, their course is, probably, nearly uniform, and confined within a comparatively narrow belt of the ocean.

In case of accident they may count with tolerable certainty upon being able to intercept and obtain assistance from other vessels of the line.

If such assistance when afforded is to be accounted a salvage service of a high order of merit, and to be compensated as if rendered by a stranger vessel, a direct encouragement is held out to the company to relax the diligence which it is their duty to exercise, and to send their vessels to sea with imperfect or unreliable machinery.

Actual negligence can rarely be proved, for the best machinery is liable to accidents. And the company might in almost every instance demand and receive a salvage compensation for performing a service, the necessity for which arose from the negligence of its agents, and the inconvenience of affording which, falls chiefly, if not exclusively, on

the passengers and owners of the cargo on board the salvaging vessel.

The service seems to have been somewhat severe and straining upon the *Arizona*. She sustained, however, no serious injury, although repairs were necessary to remedy some derangement to her machinery. The cost of these is not shown. It was, probably, inconsiderable.

In the case of the *Miranda* the value of the ship was £15,000; of the cargo, £18,755; of the freight in course of being earned, £1,875; total, £35,630, stated by Sir R. Phillimore as about £36,000, or \$180,000. On this value he decreed £350, less than one per cent., and this allowance included compensation for the loss of a hawser valued at £45.

The estimated value of the *Colima* is \$500,000; of her cargo, \$700,000; freight, \$40,000, in gold. But in this estimate the market value of the cargo is given. It should, therefore, be reduced by deducting the freight. The total contributory value will, therefore, be about \$1,200,000. The *Roxana* was delayed on her voyage forty hours. The *Colima* from two and a half to three days. The value of the coal consumed by the *Roxana* during her forty hours detention was about \$190. The value of the coal consumed by the *Colima* during two and a half days was from twelve to eighteen hundred dollars.

Guided by the analogies afforded by the case so often cited, I shall award the sum of sixteen (16) thousand dollars to be paid by the owners of the cargo laden on board the *Colima*.

THE HOTSPUR.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 5, 1874.

1. RESCISSION OF SEAMAN'S CONTRACT.—Where, on a voyage from Glasgow to Buenos Ayres, from thence to Portland, Or., and back to a port in the United Kingdom, the cook and steward, who is not a seaman, is disrated a few days out from B. A. on a charge of wasting provisions, and put before the mast, it amounts to a rescission of the contract by the master, and the steward may, when he arrives at Portland, accept such rescission, and claim his discharge; but what compensation, if any, he shall have for his services depends upon the particular circumstances of the case.
2. CONTRACT AND SERVICES OF MINOR.—A contract by a minor to serve as a seaman is a voidable one, and may be avoided by such minor at any time before its completion, and thereafter he is not bound by it in any manner, neither can he sue upon it for his services, but may recover the value of such services, allowing for any injury which the owners may sustain by reason of the avoidance of the contract.
3. BRITISH SHIPPING ACT.—Where, under the British merchants shipping act of 1854, the duration of a voyage is described in the shipping articles as *probably* twelve months, a seaman signing the articles engages absolutely to make the voyage, whether the duration of it be more or less than that period, provided the master in good faith endeavors to accomplish the voyage within the time mentioned.

Before DEADY, District Judge.

Suit for seaman's wages. The facts sufficiently appear in the opinion of the court.

David Goodsell, for libellants.

William H. Effinger, for the claimants.

DEADY, J. The libellants, Thomas M. Stewart, John Brown, William McMasters, Lluelling Griffiths, Archibald Crawford, Charles Freund, and John McFarlane, on March 10, 1874, signed articles for a voyage on the British bark Hotspur, "from Glasgow to Buenos Ayres, and, or if required, to any port or ports in South America, north or south Pacific, Australian colonies, Indian or China seas, Mauritius, West Indies, British North America, or States

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of America, until the ship returns to a final port of discharge on the continent of Europe or the United Kingdom, with liberty to call at any port for orders. Probable period of engagement, twelve months."

The vessel arrived at Buenos Ayres on May 28, and left there in ballast, about July 13, for this port, where she arrived on October 20.

A short time out from Buenos Ayres, the master put Stewart, who shipped and served up to that time as cook and steward, in irons for three hours, and then disrated him and put him before the mast, upon a charge of wasting provisions. From thenceforth Stewart was made to do sailor's duty on deck and aloft, besides being often selected to do drudgery and disagreeable or unnecessary work about the ship, even, sometimes, when it was his watch below. He was not a seaman, and when aloft was subject to dizziness, on account of which his life was in danger.

Apart from the charge of "wasting the provisions," no complaint is made of his conduct either before or after being disrated. He has three certificates of discharge from service on British vessels since 1872, in which his capacity and character as "cook and steward" are marked "very good." His appearance upon the witness stand indicated that he is an intelligent, well-behaved and industrious man.

At this port, libellant demanded his discharge of the master, and being refused, he brought this suit for his discharge and wages.

The evidence upon the charge of wasting the provisions is very meagre and unsatisfactory. The master carried the key of the locker, and was always present when the stores were weighed out. The log-book is not produced, and it does not appear that any entry of the transaction was ever made therein. I am inclined to the opinion, that the master, in putting libellant in irons and disrating him, acted without sufficient cause, and that in sending him before the mast, and treating him as he afterwards did, he acted harshly, if not cruelly.

But admitting that libellant was properly disrated, I think he is entitled to his discharge. By disrating him,

the master abrogated the contract to serve as cook and steward, as far as he is concerned. This contract being thus terminated, the master ought not to be allowed to hold the libellant to other service against his will. True, if the libellant desires it, he may be bound to keep him on board, and return him to the final port of discharge; and in such case he might lawfully require libellant to do such duty on the vessel as would be reasonable under the circumstances. But where the person disrated is unwilling to longer remain on board, I do not think the master has any power to compel him to remain, and serve in a capacity totally different from that in which he engaged. The master, so far as appears, not intending to restore him to his position as cook and steward, the libellant is entitled to his discharge.

No authority has been cited upon this question, but this conclusion seems to follow from the application of general principles to the case.

As to the question of wages, I am not clear that the libellant is entitled, under the circumstances, to recover according to the rate stipulated in the shipping articles—four pounds five shillings per month. Deducting one month's advance, and from the remainder one-third of the same, will leave about ninety dollars, for which sum the libellant must have a decree.

Crawford, Brown and Griffith, as appears from their testimony and the shipping articles, are minors. On this ground they now avoid this contract, and seek their discharge.

This is a voidable contract, and may, therefore, be avoided by these minors at their pleasure. Having elected to avoid it, it is abrogated, and the master has no longer any authority over them or demand upon them by reason of it. The result is they are discharged. The law of both Great Britain and the United States allows an infant the personal privilege of avoiding such a contract at any stage of the voyage, and the owners must be supposed to have contracted with him on this basis. They were to be bound, but the infants were at liberty to avoid the agreement. (1

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Par. on Con. 262, 3 ed.; *Vent v. Osgood*, 19 Pick. 572; *Nickerson v. Easton*, 12 Pick. 110; *Mores v. Stevens*, 2 Pick. 334.)

Upon avoiding the contract, the minor cannot sue upon it, but is entitled to recover a reasonable compensation for his services, as though no such contract had been made. (*Medbury v. Watrous*, 7 Hill, 111; *Mores v. Stevens*, supra.) In ascertaining the value of libellants' services, a deduction must be made for any injury which the owners will suffer by reason of the sudden termination of the contract. (Par. on Con. 263; n. f.; *Mores v. Stevens*, supra.)

Crawford shipped as an able-bodied seaman for the wages of three pounds ten shillings per month. Griffith and Brown shipped as ordinary seamen, the former for the wages of three pounds, and the latter two pounds per month. It appears that the bark is loading with wheat for a port in the United Kingdom. The wages out of this port for such a voyage, for able-bodied seamen is from thirty dollars to forty dollars per month, and for ordinary seamen twenty dollars to thirty dollars. Allowing the vessel five months to return in, the owners will have to pay to persons employed to take the place of these libellants, in addition to the wages paid them, a sum equal to one hundred per centum of such wages for that period. So far they are directly injured by the avoidance of this contract under the circumstances stated.

Deduct then, this sum from each of the libellants' wages for seven and one-half months, and also the one month advance, and the remainder is the amount for which they are entitled to recover.

It is objected on the part of the claimant, that this court ought to decline jurisdiction of a suit by a seaman against a foreign vessel, unless it be a case of hardship. Not admitting, but that this court, in time of peace, ought to take jurisdiction of any suit brought by a seaman against a foreign vessel, except where otherwise provided by treaty, and referring to what this court said upon this subject in the *Hermine*, ante p. 80, it is sufficient in this case to state the fact, that unless this court takes jurisdiction of this libel, there

will be a failure of justice. By avoiding their contracts, as they lawfully might do, these minors became separated from the vessel in a foreign port, and if not allowed to maintain a suit in this court against her, for the compensation to which they may be entitled, they will be without remedy.

Freund and McFarlane, as well as Stewart, Brown and Crawford, also claim that they were discharged on the morning of October 29, because the mate, having, by the previous direction of the master, ordered them to go on the wharf and truck sacks of wheat to the vessel, and they having refused, on the ground that such work was not ship's duty, said to them, with many opprobrious and obscene epithets, "Don't want you any more, go below," and ordered the cook not to give them any breakfast. A few minutes after this scene, the master came out of the cabin, the mate in the mean time having told him what had occurred, and went ashore. The men saw him go off, but nothing passed between them. The men went ashore in the course of an hour and met the master, who asked them what was the matter. They gave him their account of the transaction, and said the mate had knocked them off, and they had come ashore to get their breakfasts and a place to stay. The master replied that the mate had no authority to knock them off, to go back on ship-board, and they should be fed, whether they worked or not. The men declined to go, and seemed to think they were then at liberty to do as they pleased about the matter. The master then asked them to go with him to the British Consul. They replied as if they might meet him there, but did not. On the following Friday evening they went aboard and got their chests and left the vessel.

By the custom of this port seamen are not required to lade the vessel. Unless, then, the libellants have expressly agreed to lade the vessel, the order to truck wheat was unlawful. But the simple order did not discharge the men nor justify their leaving the ship. If they were willing to assist the stevedore, so as to speed the lading and departure of the ship, they might do so, and if not, there was no harm done in asking them. Neither is it at all clear

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that the mate intended to knock the men off. The direction to "go below"—into the fore-castle—was a lawful one, and may have been intended and understood in connection with what preceded it, as a declaration—if you won't truck wheat, there is nothing else for you to do, go below.

But be this as it may, the mate had no power to discharge the libellants, and if he attempted to do so, instead of clutching at the circumstance as an excuse to leave the vessel and recover their wages, they should have appealed to the master the first opportunity. In any case, after meeting the master on the shore and being informed by him that the mate had no authority to knock them off, and being directed by him to return on board, with the assurance that they should have their meals and need not work, they ought to have returned to duty at once.

Their refusal to do this, taken in connection with all the circumstances of the case, indicates that the libellants were seeking an excuse to leave the vessel, with the law on their side, so that they could recover their wages for the outward voyage, and be discharged in a port where wages are much higher than the final port of discharge to which the vessel was bound.

For the reasons suggested, the libellants were not discharged by the action of the mate on the occasion in question, and therefore they are not entitled to recover anything for their services. Unless this contract is substantially violated by the master, no wages are due upon it to the seamen, until the final completion of the voyage. In some respects the mate's conduct was very reprehensible and his testimony equally unsatisfactory. If the libellants, after time for reflection, had gone back to the ship and proffered to return to duty, and been refused, in a suit for wages the court would have probably excused their temporary absence, although a legal desertion, on account of the mate's conduct towards them in the first instance. But being, as I suppose, desirous to quit the ship, and at the same time thinking they had a technical advantage by which they might recover their wages, notwithstanding the non-completion of the voyage, they refused to return to duty even

when informed by the master that the mate had no authority to knock them off, and that they would not be required to handle cargo. It turns out that they were mistaken in their scheme, and must lose the wages earned unless they return to duty and complete their contract.

It is also insisted by counsel for libellants that the barque will not be able to reach a port in Europe or the United Kingdom within a period of twelve months from the date of leaving Glasgow, and that therefore the sailing to this port was a substantial deviation from the voyage described in the articles, on account of which all the libellants are entitled to be discharged and recover the wages earned up to this time.

These articles were executed under section 149 of "the merchants' shipping act, 1854," 17 and 18 Vic. c. 104, which provides that the articles, among other things, shall contain "the following particulars as terms thereof: (1.) The nature, and *as far as practicable*, the duration of the intended voyage or engagement."

Of course it was impracticable to state the exact duration of the voyage contemplated in these articles. Therefore it was sufficient to approximate to it. Accordingly it was not agreed that the voyage should not extend beyond or fall within twelve months, but only that its duration would probably be twelve months. From Buenos Ayres, the master was at liberty to go to a port or ports in any of the countries or divisions of the globe mentioned in the articles, but only to one of them. This option he has exercised in coming to this port. From here he is bound to proceed directly and with all convenient dispatch to a port of final discharge in Europe or the United Kingdom. If in so doing, more than twelve months are consumed, it is a part of the engagement of the libellants that they will remain by the vessel. They have contracted to serve for the *voyage* absolutely, and for the necessary time to make it in, be it more or less than twelve months.

Of course, if the voyage was negligently or wantonly delayed for any considerable period over twelve months, the engagement of the libellants would be at an end, whether

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the voyage was or not. The implied undertaking of the master is that there will be an honest and intelligent effort to make the voyage within the time mentioned. If this is done, the libellants took the risk of all unavoidable delay when they contracted for the voyage.

Certainly, it must have been expected by libellants, when they signed these articles that the length of the voyage might be at least two months over or under twelve months. Subject to this contingency, at least, they made this agreement. It is quite certain that the *Hotspur* will complete her voyage inside of fourteen months. This calculation allows six and a half months for the return trip. But it is also *probable*—and that is all the certainty the articles require—that she will make it inside of the twelve months.

Let a decree for the libellants, Steward, Crawford, Griffith and Brown, be entered in accordance with these conclusions; and as to Freund and McFarland that the libel be dismissed with costs to the claimant.

THE SCHOONER WITCH QUEEN.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 30, 1874.

MATERIAL MEN—LIEN—APPURTENANCES.—Where a vessel was supplied with a diving-bell, air-pump, and other apparatus not required for her use as a "navigating ship," but indispensable for the accomplishment of the enterprise in which she was about to engage: *Held*, that the lien of the material men extended to all articles belonging to the owner which (not being cargo) have been placed on board for the objects and purposes of this voyage.

Before HOFFMAN, District Judge.

Milton Andros, for libellants.

E. J. Pringle, for claimant.

HOFFMAN, J. There can, I think, be no doubt that the material and supply men by whom the libels in these cases

have been filed, are entitled to a lien under the general maritime law, independently of the State statute.

The vessel, although enrolled here, was owned in New York. The claimant is a New York corporation. The authorities are clear that the question whether a vessel is to be regarded as foreign or domestic within the rule laid down in the case of the *General Smith*, depends upon the residence of her owner, and not on the place of her registry or enrollment. (Newb. R., 308; 1 Wall. Jr., 358; 2 Pars. Adm., 326, and cases cited.)

This vessel must therefore be regarded as a foreign vessel, to which supplies have been furnished in a port other than her home port. For these supplies she is, by the maritime law, liable *in rem*.

The voyage contemplated by the vessel, and for which supplies were furnished, was a pearl-fishing voyage. As part of her necessary equipment for this enterprise she was provided with a diving-bell, air-pump, and other apparatus—not required for her use as a “navigating ship,” but indispensable for the accomplishment of the objects of the particular voyage she was about to enter upon.

It is contended that these articles are not subject to the lien of material men.

No case in point has been cited, but the question seems to be settled by the eighth rule in admiralty of the Supreme Court.

That rule provides that “in all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal.”

In what sense the word “appurtenances” is used by the Supreme Court, cannot be doubtful.

The previous enumeration of “tackle, sails, apparel, furniture and boats,” includes everything belonging to the vessel as a “navigating ship.” Unless the word “appur-

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tenances" applies to other objects on board belonging to the owners, for the purposes of the voyage, it can have no operation. The word was, no doubt, used advisedly by the Supreme Court.

In the case of *The Dundee*, 1 Hagg, Adm. R. 109, Lord Stowell held that whatever is on board a ship for the objects of the voyage and adventure on which she is engaged, belonging to the ship and not being cargo, constitutes a part of the ship and "her appurtenances," within the meaning of the statute of 53 George, 3d C. 139. And this decision was affirmed in the Court of King's Bench. (*Gale v. Laurie*, 5 B. & C., 150.) The articles in that case claimed to be "appurtenances" were "boats, fishing tackle, such as harpoon's lines, rockets, casks and various other implements termed fishing stores."

The value of the ship, her tackle, etc., was £2685, and that of her "fishing stores" was £2236. It is plain that if the "fishing stores" in that case, though their value was nearly equal to that of the ship, were properly considered as part of her "appurtenances," the diving-bell, air-pump, etc., in the case at bar, must be treated as embraced within the same description. The judgment in the case of *The Dundee* was rendered more than twenty years before the admiralty rules were framed by the Supreme Court, and the latter must be deemed to have purposely employed the term in the sense which had so long been attached to it by express judicial decisions.

I consider the language of the admiralty rule above cited so clear and decisive, that further discussion of the point is unnecessary. An additional observation however, may be permitted.

The common law rule, derived from the civil law, by which the ship-owner was held responsible *in solido* for all damages caused by the acts of his servants, the master and crew, has both in England and America been modified by statute.

The liability of the owner is now limited to the value of the ship and freight, or, in the language of the statute of 53 George 3, ch. 139: "the ship, freight and appurtenances."

By abandoning these he may discharge himself from all personal liability. The creditors are thus restricted to a particular fund, and being so restricted, the maritime law gives them a privilege or lien upon it.

"When the law," says Mr. Justice Ware, "confines a creditor to a particular fund for his remuneration, it cannot be so absurd as to prohibit him from making that fund available, by laying his hand on and securing it. The maritime law is not chargeable with any such absurdity after it has, on principles of a general policy, restricted him to a particular fund; it not only permits him to proceed directly against it *in specie* but gives him a privilege against it over the general creditors of his debtor." (*The Rebecca*, Ware's R., 199.)

If, then, the lien of the creditor is co-extensive with the liability of the ship-owner, in ascertaining the limits of the latter, we necessarily determine the extent of the former.

Any general considerations, therefore, which show that appurtenances of a ship, such as those in question in this case, and in *The Dundee*, ought not to be exempt from liability, also show that they should be subject to the creditor's lien.

The statutes in England and America, to which I have referred, merely re-establish the ancient rule of the maritime law, which prevailed universally among the commercial nations of the Continent. (*Norwich Co. v. Wright*, 13 Wall., p. 48.)

These laws were for the encouragement of commerce, but were not intended to favor one class of vessels more than another.

"If a ship," says Lord Stowell, "is run down at sea by a merchant vessel, the wrong-doing vessel is by the act that diminishes the general responsibility, still liable to contribute not only to the extent of herself, but to that of her freight outward and of her freight homeward if contracted for, and for what her owner's property would have paid for freight if it had been liable for freight. But in this class of vessels" (i. e. fishing vessels) there is no freight either outward or homeward, nor any owner's property on board and

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unless the fishing stores are made responsible in contribution, there is no fund for compensation but the vessel itself, as is actually contended for in the present instance. This class of vessels is highly favored by the British legislature and most deservedly. * * * * *

But surely it can be no part of the intended encouragement that they shall be qualified to do mischief at a cheaper rate than other vessels. If nothing but the vessel itself be liable, that would present a result apparently very unequal and unjust, not only to the injured vessel whose compensation was so much abridged, but likewise to all other vessels which, having committed the like injuries, were subjected to a so much severer retribution. (*The Dundee, ubi sup.*)

There is great force in these observations, and if they show that "fishing stores" ought not to be, and are not exempt from liability to contribution, they also, as before remarked, prove that the lien of the creditor must extend to them.

The denial of the lien in the present case would be peculiarly unjust.

It is not disputed that the persons who have furnished the diving-bell, air-pump, etc., have a lien on the vessel for their price. They thus come in concurrently with the other material-men for their proportion of her proceeds.

It would be most unjust that the very articles, the supplying of which gave birth to this lien, should be exempted from its operation.

I think, therefore, that the lien in this case extends to all the articles belonging to the owner, which (not being cargo) have been placed on board for the objects and purposes of the voyage and enterprise in which she was about to engage.

The supplies appear to have been ordered in part by the master, with the owner's knowledge and consent, and in part by the latter.

Under such circumstances the supply-men have a lien *in rem*, for the satisfaction of their claims. (*The Grapeshot*, 9 Wall. 129; *The Gay*, 9 Wall. 758, 4 Bened. R. 16.)

The parties may, very possibly, be able to settle by

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agreement, the amounts due to the several libellants. Should any controversy arise, it may be brought before the court or referred to the commissioner to take testimony and report.

WM. N. MEEKS v. FERDINAND VASSAULT ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 30, 1874.

1. VOID PROBATE SALE.—LIMITATION.—Under section 190 of the probate act of California, an action to recover lands in the possession of a purchaser, at a sale made by an acting administrator under the orders of a Probate Court, even though the sale is void, must be brought within three years next after the sale, or it will be barred.
2. REAL ESTATE—ASSETS.—Under the statutes of California, real estate of deceased parties is assets in the hands of the administrator, to be administered like personalty.
3. SAME—RIGHT OF POSSESSION.—Under the statutes of California, the exclusive right to the possession of real estate of the deceased, and the exclusive right of action to recover it is vested in the administrator, pending the administration, or till the lands are distributed to the heirs.
4. SAME—ACTION BY HEIR.—The heir cannot maintain an action to recover the real estate of the deceased after administration has commenced, until the administration is closed, or the land has been distributed to the heir.
5. ADMINISTRATION—LIMITATIONS—DISABILITIES.—The pendency of administration and the inability of the heir to maintain an action to recover real estate by reason thereof, and of the present right of action being in the administrator, do not constitute a disability on the part of the heir within the meaning of section 191 of the probate act of California. Such a state of facts does not interrupt or prevent the running of the statute, as provided in section 190.
6. ADMINISTRATOR—TRUSTEE.—For the purpose of bringing an action to recover land belonging to the intestate's estate, the administrator is the trustee or representative of the heir, and since the exclusive right to bring the action is vested in him, the law also imposes upon him the duty to bring it.
7. ADMINISTRATOR BARRED—HEIR BARRED.—Where the administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir is a minor at the time the action accrues to the administrator.
8. SAME—REMEDY OF HEIR.—In such case the heir has his remedy

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- against the administrator and his bondsmen, or he may, in a proper proceeding, compel the administrator to sue.
9. TRUSTEE—CESTUI QUE TRUST.—Where the trustee having the right of action is barred, the *cestui que trust* is barred.
10. ADMINISTRATOR—JUDGMENT, EFFECT OF.—If the title to real estate of the deceased is put in issue and determined in an action between the administrator and another, the judgment will bind the heir to the same extent that it binds the administrator.
11. SECTIONS 258 AND 259 OF THE PROBATE ACT do not limit the operation of section 190.
12. STATUTE OF LIMITATIONS—TITLE UNDER.—An adverse possession of land for the time prescribed by the statute of limitations, vests the title thereto in the adverse possessor.

Before SAWYER, Circuit Judge.

Ejectment.—The land in controversy is one hundred-vara lot number ten, of the hundred-vara survey south of Market street, in the city of San Francisco, and within the limits embraced by the Van Ness ordinance, the decree confirming the Pueblo title, and the acts of the legislature of California and of Congress, confirming it; and not within any of the exceptions mentioned in said decree or in said acts. Said lot was granted by George Hyde, alcalde of San Francisco, to James G. D. Dunleavy, January 14, 1847, and possession duly taken under said grant. Said grant was duly recorded in "Book A" of alcalde grants on the same day. On June 2, 1847, said Dunleavy conveyed said lot to George Harlan, who afterwards died intestate in Santa Clara county, of which he was then a resident, July 8, 1850, seized of all the right, title and interest in said land derived from said grant and the possession thereunder. Said George Harlan left surviving him as his heirs-at-law, a widow, six children, and two grandchildren, lawful issue of a deceased child, who died during the lifetime of said Harlan, of whom four of said children, and the two grandchildren were minors, and the others adults of full legal age. The said widow and three eldest children conveyed all their interest in said lot to plaintiff at various times prior to August 11, 1874; the three next eldest in 1869, and the two grandchildren in 1872, by virtue of which said several conveyances, all the interest of the heirs of Harlan,

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deceased, in said lot, became vested in said plaintiff before the commencement of this suit. Some of said heirs attained their majority within three years next before the commencement of this action. Before, and at the time of the commencement of this action, the several defendants were severally in possession of the portions of said lot described in their respective answers.

On August 19, 1850, Henry C. Smith was appointed by the Probate Court of Santa Clara county, administrator of the estate of said George Harlan, deceased. Letters of administration having issued to him, he duly qualified and entered upon his duties as administrator. On December 31, 1853, said Henry C. Smith, without first having settled his accounts as administrator, filed in the Probate Court his resignation in writing of his administratorship; and thereupon the court, without in express terms accepting said resignation, made an order in which, after the introduction, "Now comes Henry C. Smith, administrator of the above estate, and files his resignation as administrator of said estate," he is ordered to turn over to John Yontz, public administrator, all the said estate; to make with said public administrator a full and complete settlement relating to said estate on or before the first day of the next succeeding term of said court, and providing that upon such full settlement he and his sureties should be discharged. And it was further ordered that said estate be placed in the hands of said public administrator "for purposes of general administration." Sufficient funds had come to the hands of Smith, had they been properly applied to have paid all the debts of the estate, together with the expenses of administration. No final settlement of the accounts of said Smith as administrator was ever made, either with the public administrator or the court, but no further proceedings were had with respect to his removal except such as are implied from the recital in the foregoing order and from the appointment of a successor, and the subsequent recognition of the latter as administrator in the further proceedings of the court.

On June 15, 1855, Benjamin Aspinwall, on his own peti-

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tion, was, by the same court, appointed administrator of said estate of Harlan, deceased. He duly qualified as such, and letters of administration were issued to him in due form of law, under which he acted till he resigned, settled his accounts, and was discharged. On August 25, 1855, said Aspinwall, as administrator, presented a petition to the Probate Court, praying the sale of said lot number ten, in order to raise funds for the payment of a judgment before recovered by himself personally against said Smith as administrator. Said petition was defective in that it omitted to state certain facts required by the statute to give authority to the court to order a sale. After notice given upon November 10, 1855, the Probate Court upon said petition, made an order for the sale of said lot. On January 7, 1856, in pursuance of said order, said Aspinwall, acting as such administrator, upon due notice, exposed said lot number ten to sale at public auction in thirty-two subdivisions, and sold the same in said subdivisions to said several defendants and their grantors respectively. Said sale was fairly conducted. The several purchasers paid the several sums bid at said sale to said Aspinwall. The sales, with the proper vouchers and proofs, having been reported to the Probate Court, they were confirmed, and deeds of conveyance ordered to be given to the several purchasers; and deeds were accordingly executed and delivered by the administrator on February 13, 1856, purporting to convey the fee simple of said lots held by Harlan at his decease.

Said several grantees of Aspinwall as administrator in said conveyances, made in pursuance of said sale, either immediately upon their execution, to wit, on February 13, 1856, entered into the actual possession of the subdivisions respectively purported to be conveyed thereby, or being already in possession, continued in such possession, and from that time forth till the commencement of this action, they and their grantees, including the defendants to this action, have actually and continuously possessed said several subdivisions, claiming title thereto in fee simple, under and by virtue of said several deeds of conveyance, and so possessing and claiming them openly, notoriously, exclu-

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sively of any other right, and adversely to all the world. Some of said defendants are the original grantees in said deeds from Aspinwall as such administrator, and the others have acquired the title of other such grantees of Aspinwall by conveyance in due form of law and for valuable considerations by them paid.

Said Aspinwall continued to act as administrator till May 12, 1864, when, upon a citation issued, a rendering of his accounts, and a settlement, allowance and confirmation thereof by the Probate Court, he was discharged by order of the court.

Afterwards, on May 12, 1864, Joel Harlan and Lucian B. Huff were appointed administrators of said estate. Having duly qualified, they entered upon the discharge of their duties as administrators, and they are still acting as such, the administration of said estate not having been finally closed.

On October 16, 1869, the plaintiff filed a petition in the Probate Court in which the administration of said Harlan, deceased, was pending, stating, among other things, that said Joel Harlan and Lucian B. Huff were the administrators of said estate; that no debts or claims of any kind had been presented to them or either of them, as such, against said estate, and that none existed; that he had acquired from the said heirs of said Harlan, and then owned all the right, title and interest, which said heirs had derived from said Harlan in and to said lot number ten, and praying that said lot number ten might be distributed to said plaintiff, and he be declared by the court to be the owner thereof upon his giving security for the payment of his proportion of the debts of the estate. Afterwards, on November 6, 1869, a citation having been issued and notice given, and a hearing having been had upon said petition, it was by said court, "ordered, adjudged and decreed, that there be, and there hereby is, distributed to the said Wm. Newton Meeks [the plaintiff in this action], said lot number ten (10), and he is hereby adjudged and decreed to be the owner thereof in fee simple absolute as against the said administrators and their successors, and the heirs at law of

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said deceased, and entitled to the possession thereof." Afterwards, on September 30, 1872, said Meeks, as plaintiff, commenced this action.

Wm. H. Patterson, for plaintiff.

S. M. Wilson and Alexander Campbell, for defendants.

SAWYER, Circuit Judge. The probate proceedings down to, and including the administration of Aspinwall, are the same in question in the Supreme Court of California in *Haynes v. Meeks*, 20 Cal. 288, and the facts relating thereto are fully set out in the report of that case. These proceedings were also, to some extent, considered by the Supreme Court of California in *Haynes v. Meeks*, 10 Cal. 110; *Meeks v. Hahn*, 20 Cal. 621; and *Harlan v. Peck*, 33 Cal. 515. The sale by Aspinwall having been adjudged void in *Haynes v. Meeks*, by the highest court in the State, plaintiff claims a right to recover. But the defendants set up and rely on the special statute of limitations found in the probate act relating to administrators' sales. Section 190 of that act is as follows: "No action for the recovery of any estate sold by an executor, or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate unless it be commenced within three years next after the sale." If this section is applicable to a void sale, like the one in question, then the action was long since barred, unless there is some other provision of the statute, or rule of law, that preserves the right of action in the plaintiff upon the facts of this case. That the statute is applicable to the sale in question, has been settled, and I think correctly, by the Supreme Court of California, in cases arising upon a sale of a portion of this very estate. (*Harlan v. Peck*, 33 Cal. 520; and *Harlan v. Miller*, January Term, 1868, affirming it.) This being the construction of a statute of California by the highest court of the State, it is conclusive in this court. (*Walker v. The State Harbor Commissioners*, 17 Wall. 648; *Williams v. Kirtland*, 13 Wall. 311; *Tioga R. R. v. Blossburg & Corning R. R.*, 20 Wall. 137.) The statute would be

useless if it did not apply to a void sale. A purchaser at a valid sale would not need the protection of the statute.

Under the statutes of California real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of administration and debts of the deceased, and then the residue after satisfying all lawful claims distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator. The heirs cannot maintain an action to recover the real estate pending the administration, or after administration has been commenced, until the estate has been settled, or the real estate has been distributed to them by the Probate Court. This is also settled by numerous decisions of the Supreme Court of this State. (*Meeks v. Hahn*, 20 Cal. 621; *Meeks v. Kirby*, 47 Cal. 168; *Chapman v. Hollister*, 42 Cal. 462; *Burton v. Lies*, 21 Cal. 91.) This being so, it is insisted by plaintiff's counsel, that since neither he nor his grantors, the heirs of Harlan, could maintain an action for the recovery of the lands in controversy pending the administration, or until distributed by the Probate Court on November 6, 1869, they were under a legal disability to sue, within the meaning of section 191 of the probate act; and the action having been brought within three years after the said distribution, that it is not barred. Section 191 is as follows: "The preceding section shall not apply to minors or others under any other legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability." The question is, what is the meaning of the phrase, "any legal disability to sue," as here used? This provision does not define the term "legal disability." It assumes that there are other disabilities known to the law, and we must go to the law as it existed outside of this section to ascertain what they are. The

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provision mentions “minors,” and adds, “or others under any *legal* disability.”

Upon turning to the general statute of limitations we find specified as disabilities, infancy, insanity, imprisonment for criminal offenses, coverture, etc., but neither in that nor in any other statute is anything of the kind now claimed as a disability, named or recognized as such. The definition of “disability,” as given by Bouvier, is, “The want of legal capacity to do a thing.” (Bouv. Law Dictionary.) The disability may relate to the power to contract, or to bring suits; and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy; or, want of freedom of will, as in the case of married women, and persons under duress; or out of the policy of the law, as alienage when the alien is an enemy, outlawry, attainder, *praemunire*, and the like. The disability is something pertaining to the person of the party—a personal incapacity—and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. In this case there was no want of power, or capacity in the person. The difficulty is in his relation to the subject-matter of the suit. There was no present right of action in the heir, or his vendee. He had not yet succeeded to the right of action. The cause of action had accrued, but it was in the administrator, and had not yet passed to the heir. There was, however, a party in existence competent to sue—one to whom the law gives the right, and upon whom it imposes the duty to sue. This party is the administrator who is the trustee of the estate, and who for this purpose represents both the heirs and the creditors of the estate. He represents the title. If the administrator sues, or is sued, and fails when the title is in issue and determined, the judgment is binding both upon the heirs and creditors of the estate. The matters thus adjudged would afterwards be *res adjudicata* between the opposing party in the action and the heirs, as well as the administrator. This has, also, been settled by the Supreme Court of the State. (*Cunningham v. Ashley*, 45 Cal. 485.) This could not be so unless the administrator represented the heirs. The disability mentioned is un-

doubtedly one of the disabilities already existing recognized by the statute, such as those mentioned in the statute of limitations affecting the capacity to sue of a person having a present right of action existing in himself, and which excuses him from bringing the action. It cannot mean the want of a present cause of action. If there is no present right of action in a party, he has no occasion for a present capacity, an ability, to sue, or, for an excuse for not suing. The administrator being invested with the right of action to recover land of the estate, if he neglects to sue too long the action is barred, and as he represents the creditors and heirs for this purpose, it has often been decided that when an action is barred as to him, it is barred as to the heir, even though the heir be at the time a minor, or resting under some other disability. (*Darnall v. Adams*, 13 B. Mon. 278-9; *Couch's Heirs v. Couch's Administrators*, 9 Id. 161-2; *Rosson v. Anderson*, Id. 425; *Williams v. Otey*, 8 Humph. 569; *Woodbridge v. Planter's Bank*, 1 Sneed. 297; *Worthy v. Johnson*, 10 Geo. 358; *Long v. Cason*, 4 Rich. Eq. 60; *Wych v. East India Co.*, 3 P. Will. 309; *Pentland v. Stokes*, 2 Ball & B. 74; *Smilie v. Bifle*, 2 Barr. 52.) Several of these are cases of administrators, and others of other trustees, where the *cestui que trust* was held to be barred when the trustee was barred. It is difficult to see how upon principle it should be otherwise. The moment an adverse possession by a wrong doer, of lands belonging to an estate in course of administration commences, a cause of action arises to recover it; but the policy of the law vests it exclusively in the administrator, and there it remains until the lands are lawfully sold and conveyed for purposes of administration, or are distributed to the heir. In the former case the right of action passes to the purchaser; in the latter to the heir. It is the same cause of action, and it exists in but one party at the same time. If the cause of action is barred before the sale and conveyance to the purchaser, or the distribution to the heir, there is none left to pass to either, and neither ever acquires any valid cause of action at all. If the authorities cited are not all wrong, the difficulty with the plaintiff is, not that he was laboring under a disability to sue upon an existing

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cause of action in his favor, but that he never became vested with a living cause of action. The cause of action became barred, and the title vested in the adverse possessor under the special statute of limitations before it came to him. Statutes of limitations are now regarded as statutes of repose, and not mere penalties for neglect, and are intended for the benefit of those who have purchased and occupied lands in good faith, believing they acquired a good title; and the policy of the law seems to have been, to shorten the time within which rights acquired in good faith under the sanction of judicial proceedings in Probate Courts can be disturbed. Whether as effective as desirable or not, the heirs are not without a remedy. They have a remedy against the administrator and upon the administrators' bond; and they may, in a proper proceeding, also compel the administrator to sue. (*Smilie v. Bifle*, 2 Barr, 52-4; *Tyler v. Houghton*, 25 Cal. 29.) Besides, it is not apparent in this case why the partial distribution could not have been made as well within three years, as more than thirteen years after the sale, and thus have enabled the distributees to sue. There must have been gross negligence on the part of the heirs in not compelling the several administrators to account, and in not applying for a distribution. Ample funds appear to have come to the hands of the administrator to pay all claims against the estate as early as 1855. If the heirs are not bound when the bar has attached as against the administrator, the administration, by the non-action of the heirs, might be kept open indefinitely, and the right of action prolonged for a century at their option.

The defendants entered under their conveyances in 1856. If, as claimed by plaintiff, the whole proceedings were void, a right of action accrued in favor of the administrator to recover possession immediately; and it was barred as to him at the end of three years, or in February, 1859. The partial distribution to plaintiff was not made till November, 1869, more than ten years after the bar of the statute attached as against the administrator. If the cause of action is not barred as to the heirs and the plaintiff, their successor in interest, then, we have this curious condition of things.

For upwards of ten years the defendants were wrongfully in possession of the land, and yet there was no right of action in favor of anybody to recover. The administrator could not recover because he was barred. The heirs could not recover because the law vested the right of action exclusively in the administrator. The heirs would at length acquire the land, while it would cease to be assets of the estate, and the creditors be cut off. Why should the creditors, who, under the statute, have the first lien upon the estate, be barred by the neglect of the administrator, while the heirs, whose interest is subordinate, are not? The language of the statute is express, that "no action shall be maintained by *any heir or other person* claiming under the deceased testator or intestate, unless it be commenced within three years *next after the sale*." The heir is named in terms.

The plaintiff's counsel insists that under our statute the heir occupies a position similar to a remainderman; that the remainderman is not barred by the neglect of the holder of the preceding estate to sue until his right is lost, and that for similar reasons, the heir is not barred by the failure of the administrator to sue. The decisions relating to remaindermen seem to depend upon the particular language of the various statutes under which they arose, and to vary with the language. But whatever the rule may be with respect to remaindermen, I do not think their position is like that of the heir under our statute. The owner of the particular estate and the remaindermen do not represent the same estate. There is no connection whatever between them, except that one estate begins where the other shall end. The intermediate owner is in no respect the trustee or representative of the remainderman. But the administrator is a trustee of the heir and the creditor. He represents the heir and the creditor in the administration. As we have seen, a judgment in a suit to which the administrator is a party, and in which the title to the estate is determined, binds the heir. This must be because he represents the heir. I put the decision upon the statute, and upon this principle as sustained by the authorities. The

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same statute which vests the right to the exclusive possession of the real estate, and the exclusive right of action to recover it from a disseisor pending administration, and which confers the power to sell and convey title to the real estate under the authority and direction of the Probate Court, also prescribes the time within which an action must be brought by the heir or any other party claiming under the deceased, to recover the land from a purchaser in possession under a sale improperly made. It also prescribes the exceptions to the general rule laid down, and the court is not authorized upon the idea that other cases are within the equity, though not within the letter of the statute, to interpolate other exceptions than those expressed in the statute itself. (*McIver v. Ragan*, 2 Wheat. 28; *Tynan v. Walker*, 35 Cal. 643.)

Sections 258 and 259, providing for a final distribution to the parties entitled, and providing that each party to whom a specific portion is allotted, "shall have the right to demand and recover their respective shares *from the executor, administrator, or any person having the same in possession*," in no respect limits the provisions of section 190, as claimed by plaintiff. These sections only apply to property belonging to the estate at the time of distribution. Of course, there can be no title created by the act of distribution. Nothing can be given to the distributee but that which remains in possession or custody of the administrator, as a portion of the estate. Property lawfully sold by the administrator and conveyed by valid conveyance, ceases to be a portion of the estate; and the fact that the court should assume to distribute such property to the heir would not re-vest a title in the distributee. The adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and all the world. (*Arrington v. Liscom*, 34 Cal. 380-7; *Cannon v. Stockman*, 36 Cal. 541; *Lamb v. Davenport*, 1 Saw. 621; *Winthrop v. Benson*, 31 Maine, 384; *Leffingwell v. Warren*, 2 Black, 605, and cases therein cited.)

Suppose an action upon a promissory note or other demand or to recover a piece of personal property belonging

to the estate had become barred under the general statute of limitations by neglect of the administrator to sue, would it be claimed that a subsequent distribution of the dead cause of action to the heir, would give it new life and enable him to recover on it? I think no such claim would be made. Yet sections 258 and 259 would as clearly apply to such cause of action as to real estate, the title to which has been vested in an adverse possessor under the section in question.

I see no way of escape from the conclusion that plaintiff's action is barred under section 190 of the probate act.

There must be a judgment for defendants with costs, and it is so ordered.

IN RE C. B. COMSTOCK & Co.

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 7, 1874.

1. FOREIGN CORPORATION, ACTS OF, WHEN VOID.—A statute of Oregon provides that "a foreign corporation before doing business in the State, must duly execute" a power of attorney, appointing an agent upon whom all process may be served in suits against such corporation: *Held*, that such a corporation before complying with said act, had no power to contract or sue in the State, and that the act was prohibitory and anything done by the corporation contrary to it, was illegal and void.
2. ESTOPPEL IN PARS.—The doctrine of estoppel *in pars* does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a foreign corporation made in violation of the above mentioned act, is not estopped to show its illegality for the purpose of preventing a recovery upon it.

Before DEADY, District Judge.

Objection to proof of debt.—On September 20, 1874, the Bank of British Columbia filed an amended proof of debt against the estate of C. B. Comstock & Co., for the sum of \$6,620.88. On September 26, the assignee filed an objection to such amended proof to the effect that such bank was a foreign corporation, and had never complied with

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Secs. 8 and 9 of the act of the State, of October 24, 1864, requiring a foreign corporation before transacting business in this State, to appoint an attorney upon whom all process necessary to give jurisdiction over such corporations to the courts of this State, may be served.

Counsel for the bank moves to strike out the objection, because: 1. Said objection is improperly pleaded with objections "which are substantial in character." 2. The assignee is estopped to deny that the bank is a foreign corporation authorized to do business in this State, for the reason that it appears the bankrupts "so dealt and traded with it;" and 3. Said Comstock & Co. borrowed the money of the bank "which is the subject of this proof" and "thereby did acknowledge that the bank was a foreign corporation authorized under the laws of the State of Oregon to do business in said State, and therefore the assignee of said Comstock & Co. cannot now be heard to deny the same."

The first point made in support of the motion was not argued.

William H. Effinger, for the creditor, cited 2 N. B. R. 131; 2 Par. on Con. 798-9, note; 19 N. Y. 484; 3 Sandf. 170; 13 Am. L. R. N. S. 610; 14 Ind. 90.

William Strong, for the assignee, cited 13 Pet. 588; 8 Wall. 180; 2 Paine, 516; 8 Wend. 480; 11 Ohio State, 191; Potter's Dwarries on Statutes, 222; Herman on Estoppel, Secs. 540 and 571.

DEADY, J. On the argument it was admitted by counsel for the assignee, that he stood in the same relation to the matter as the bankrupts, and could not be heard to make this objection unless they could. Without expressing an opinion upon this proposition, it is assumed for the purposes of this case that such is the law.

It was also admitted that the bank is a foreign corporation, empowered by its charter to loan money and collect the same within this State, so far as the laws thereof permit.

Two questions appear to arise in the case: 1. Does the Oregon statute *prohibit* the transaction of business therein

by a foreign corporation until its requirements are complied with? 2. Is the assignee estopped to show a want of compliance by the bank with the statute because the bankrupts were parties to the transaction alleged to have been done in violation of it?

The existence of the foreign corporation styled the Bank of British Columbia, is admitted by the assignee. But it is denied that such corporation has the power to transact business in this State, except by its consent, and then only upon the terms of such consent; and it is claimed that a transaction in violation of such terms is illegal and void for want of power in the corporation.

A foreign corporation has no existence beyond the limits of the sovereignty which created it. As was said in *Bank of Augusta v. Earle*, 13 Pet. 538: "It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Yet by the comity of nations the existence of a foreign corporation will be recognized in other countries, and if not prejudicial to their interests or repugnant to their policy it will be permitted to transact business therein. In Story's *Con. of Laws*, Sec. 38, it is said: "In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

The doctrine is thus stated by Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 181: "The corporation being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'it must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests

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or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that *such assent may be granted upon such terms and conditions as those States may think proper to impose*. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." (See also *Lafayette M. Co. v. French*, 18 How. 407; *Ducat v. The City of Chicago*, 10 Wall. 400.)

The bank then has no power to make a contract within this State, without its permission or assent. If the State is silent on the subject, by the comity of nations, its permission is presumed, unless it would be contrary to its policy or interest. But the State has spoken on the subject and given its consent to the transaction of business within its jurisdiction by the bank, not absolutely, but upon a condition or a limitation. This condition or limitation is found in the first clause of Sec. 8 of the act aforesaid, which provides that "a foreign corporation *before* transacting business in the State, *must* duly execute and acknowledge a power of attorney and cause the same to be recorded in the county clerk's office of each county where it has a resident agent."

The State having this right to permit the bank to do business within its limits or not, with or without terms, has seen proper, for the security of its citizens, to require the execution and record of this power of attorney *before* the transaction of such business. The purpose of this requirement as disclosed in section 9 of the act, is to thereby secure the appointment of an attorney authorized to receive service of process for the bank, so as to enable the citizens or inhabitants of Oregon who may do business here with it, to sue it in the courts of the State, and thereby avoid the delay and expense, which would often be tantamount to a denial of justice, of following it into the courts of the foreign jurisdiction where it was created.

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It follows, of course, from these premises, that the bank had no power to contract in the State until it had complied with the terms upon which the permission to do business was granted. It was required to perform the condition *before* it transacted business. From the passage of the act of 1864 *supra*, the assent of the State which was implied by the comity of nations was expressly qualified, so as to be in effect as follows: "The Bank of British Columbia is permitted to transact business in this State, but *before* doing so it *must* execute and record a power of attorney," etc.

Whilst it is manifest to the most ordinary observation that it was the intention of the Legislature to permit the transaction of business in this State by a foreign corporation only upon the terms provided in the act, yet as it contains no provision imposing a specific penalty for neglect to appoint an attorney as required, or authorizing a proceeding by the State against such corporation for illegal exercise of corporate powers therein, unless the appointment of an attorney is held to be a condition precedent to its right to do business in the State, the act is nugatory.

But it is said that this statute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and void. It is the duty of a court to give effect to the intention of the Legislature as far as practicable, and such intention should be ascertained from the words used in the statute and the subject matter to which it relates. The words of this act are certainly mandatory in form. *Before* transacting any business the corporation *must* appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the State the right to sue the foreign corporation in the courts of the State; but unless the attorney is appointed *before* the business is transacted it will not be attained. In *Rex v. Locksdale*, 1 Burr. 447, Lord Mansfield laid down the rule that whether a statute is mandatory or not, depends upon whether the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is re-

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quired, and without this the statute would be utterly inoperative.

This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this State without first complying with its terms, and as a necessary consequence all acts done in violation of it are illegal and void. The legal effect of the act is the same as if it read: It shall be unlawful for any foreign corporation to transact business in this State before appointing an attorney, etc.

In *Springfield Bank v. Merrick et al.*, 14 Mass. 324, it was held that when a statute prohibited banking corporations of that State from receiving or negotiating the bills of banks not so incorporated, a promissory note payable in such bills to a banking corporation of Massachusetts was void and no action could be maintained upon it by the payee.

In *Russell v. DeGrand*, 15 Mass. 37, it was held that a promissory note given for the premium on a policy of insurance on a vessel bound on a voyage prohibited by the laws of the United States, was void.

In *Wheeler v. Russell*, 17 Mass. 280, it was held that a promissory note given in payment for shingles sold contrary to a statute requiring them to be surveyed before offered for sale was void. In delivering the opinion of the court, the Chief Justice said: "No principle of law is better settled than that no action will lie upon a contract made in violation of a statute or of a principle of the common law."

In *White v. The Franklin Bank*, 22 Pick., it was held, that when upon the making of a deposit in a bank the depositor received a certificate in which it was stated that the money was to remain on deposit for a *certain time*, and a statute provided that no bank should make or issue any certificate or contract for the payment of money at a future day certain, such certificate was issued in violation of such statute and as against the bank illegal and void.

In *Bekling v. Pitkin*, 2 Caines, 149, Thompson, J., said, "it is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." In *Shiffner*

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v. *Gordon*, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that when a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

In *Bank of the United States v. Owens*, 2 Pet. 538, the court held that a contract contrary to a clause in the act incorporating the bank, which forbid it to take a greater interest than six per cent., but did not declare such contract void, was nevertheless illegal and void. In answer to the question, "whether such contracts are void in law, upon general principles," the court say: "The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummations of violation of law?"

In *Harris v. Runnels*, 12 How. 83, Mr. Justice Wayne says: "The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void; and they are so, whether the consideration to be performed, or the act to be done, be a violation of the statute." And again (p. 84), he says: "When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." Now, this statute is manifestly made "to promote the general welfare" of the people of this State. It is silent as to the consequences of its violation, and therefore the general rule applies—"a contract in contravention of it is void."

The following cases arose under statutes similar in purpose to the act of this State, and they all hold that a contract in contravention of the statute is illegal and void, unless the contrary is provided.

In *Williams v. Cheeney et al.*, 3 Gray, 222, it was held that a promissory note given for the premium of insurance to a foreign insurance company which had not complied with the statutes of Massachusetts upon that subject was void in

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the hands of the company. In *Jones v. Smith*, *supra*, 501, in a like case, it was said by the court, Metcalf, J.: "It was essential to the validity of the contract of insurance, which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of the commonwealth." This ruling was followed in *Roche v. Ladd et al.*, 1 Allen, 441, in which, according to the syllabus of the case, the court, Hoar, J., held that "a note given for the premium upon a policy of insurance issued in violation of St. 1856, c. 252, concerning insurance companies, is invalid." In *National M. F. I. Co. v. Pursel*, 10 Allen, 232, it was held by the court, Hoar, J., that a contract of insurance with a foreign company in violation of the following enactment: "Every foreign insurance company *before* doing business in this State shall, in writing, appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served," was void. This statute is substantially the same as the Oregon act.

In the *R. S. In. Co. v. Slaughter et al.*, 20 Ind. 520, it was held that a contract of insurance made with a foreign insurance company, contrary to the statute of Indiana, was void.

In *Cin. Mut. H. A. Co. v. Rosenthal*, 55 Ill. 90, it was held that a contract of insurance with a foreign company made in violation of the law of Illinois was void. The statute in that case provided that it should not be lawful for foreign insurance companies to do business in that State, without first procuring a certificate of authority from the auditor of the State. In the course of the opinion, the court (p. 91), say: "When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give the person or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be en-

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forced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt."

In this case, on behalf of the insurance company, it was contended that as the act imposed a penalty upon the agent for doing business contrary to it, it thereby appeared that the legislature did not intend to make the contract void. After disposing of this objection, the court (p. 92) say: "Had no penalty been provided, no one would have, for a moment, hesitated to say that the note was, under this law, utterly void." In the Oregon act there is no penalty, nothing but the unqualified command or prohibition, which has universally been held to render invalid all acts done contrary to it.

In *Ætna Insurance Co. v. Harvey*, 11 Wis., 395, it was held that no action could be maintained by a foreign insurance company upon a note given for a premium of insurance, where the company had neglected to comply with the statute of Wisconsin, which provided that it should not be lawful for any such company to transact business in the State without first having filed a statement of its affairs and condition with the Secretary of State. In the course of the opinion the court (p. 396) say: "The sole question therefore presented in the case is as to the effect of such non-compliance upon the contract, and the note sued on. It was claimed for the plaintiff in error, that inasmuch as the statute does not say that any policy issued or note taken in violation of its provisions should be void, that therefore they should not be so held. And that the only effect of the law would be to render the agent liable to prosecution for violating it or to an action for damages. But we do not see how this position can be sustained in view of the well-established rule of law that a contract made in violation of a statute is void, and that courts will never lend aid to its enforcement."

Upon these authorities, as well as upon the plain reason

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of the matter, I think there can be no doubt but that the Oregon act prohibited the making of the contract by the bank, which is here sought to be enforced, and therefore, as against it, it is illegal—unlawful—against law—and void. Is the assignee estopped to show the invalidity of this contract because the bankrupts were parties to the transaction? I do not think the authorities cited by counsel for the bank upon this question are in point. They are the *Methodist E. U. C. v. Pickett*, 19 N. Y. 484, and *Palmer v. Lawrence*, 3 Sandf., 170. In the latter case the court say: "that a defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but that all such objections, if valid, are only available on behalf of the sovereign power of the State." In the former one the rule is stated thus: "The rule established by law as well as reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question."

In this case it is admitted that the bank is a corporation, but a foreign one. No defect or irregularity in its organization is sought to be alleged or any subsequent abuse of its powers. But on the other hand, it is alleged and shown: 1. That as to this transaction it was not a corporation at all—not even a corporation *de facto*, and was therefore utterly without power to contract with Comstock & Co. 2. That if it was a corporation existing by the comity of nations, in this State, it was by the State expressly prohibited from making this contract when and as it did, and therefore the same is illegal and void.

This foreign corporation having no power to do business in this State, except by the consent of the State, and consent having been given upon a condition precedent, which was never performed, the power to make this contract was never in the corporation. So far as it was concerned the act was *ultra vires*.

The doctrine of estoppel *in pias* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure*, had not the power to do a particular thing, or that it was done in violation of a statute. When, in a given case, it appear there is a corporation *de facto* acting under a law which gives power to do the act in question, the party dealing with such a corporation so as to recognize its existence, is therefore estopped from alleging any irregularities in its organization with a view of showing that such act is illegal. But where the objection is a want of power in the corporation, and not a defect in its organization, the case is different. For instance, a corporation formed under the laws of Oregon for the purpose of navigating the Wallamet river would have no power to engage in the manufacture of shoes, and if it did so its acts would be illegal. No one would be estopped to allege the fact whenever it became material. To do so would only be to deny its existence as a corporation to manufacture shoes, and as to this it would be neither a corporation *de facto* nor *de jure*. Again, if such a corporation was forbidden by statute to carry Indians on its boats, it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money.

In *Russell v. DeGrand*, *supra*, the voyage upon which the vessel was insured being an illegal one, the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. So in the cases above cited, arising under the laws of Massachusetts, Indiana, Illinois and Wisconsin, concerning foreign insurance companies doing business in those States, the defendants, although parties to the transactions, were allowed to show that they were contrary to law and void. The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a State, as manifested by its legislation, is of much more importance than the real or purposed equities of the parties to an illegal transaction, and therefore they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in oppo-

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sition to such policy. Otherwise the public law and policy would be at the mercy of individual interest and caprice.

In 2 Par. on Con., (5th ed.,) 799, it is said: "It must be obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he has power to do;" and with like reason the converse of this proposition must be true—a party is not thereby precluded from denying that another has made a contract which he had no power to make or was prohibited from making, although he may have been a party to such illegal contract. In note *w* to the text of Par. on Con., *supra*, it is said: "A corporation may show its incapacity for a certain contract or course of action." "There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party." (*Steadman v. Duhamel*, 1 C. B. 888.) "Legal incapacity cannot be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity." (*Kent v. Colman*, 39 Penn. St. 299.)

In *Lowell v. Daniels*, 2 Gray, 161, it was held that a married woman was not estopped to show that her deed, which upon its face appeared to have been made when she was *feme sole* was in fact made when she was *covert* and therefore void. In the course of the opinion, Thomas, J. (p. 169), says: "This doctrine of estoppel *in pias* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." To the same effect, in the case of an infant, is *Brown v. McCune*, 5 Sandf. 224. In the same way, to allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the State has imposed upon its power of doing business therein.

On this occasion I do not wish to be understood as expressing any opinion upon the question whether this contract or transaction is void as against the assignee, or whether, in this respect, it comes within the rule laid down by Comyns, and cited with approbation in *White v. Franklin*, *supra*, which allows an action in disaffirmance of an illegal contract for the purpose of preventing “the defendant from retaining the benefit which he derived” therefrom.

The objection to the proof of debt is well taken, and the motion to strike out is denied with costs. I also suggest that this question ought to have been made by demurrer to the objection.

OTTO BERNHARD ET AL v. FRANCIS CREENE ET AL.

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 12, 1874.

1. TORTS ON THE HIGH SEAS, JURISDICTION OF.—The District Courts of the United States, as courts of admiralty, have jurisdiction of torts committed on the high seas, without reference to the nationality of the vessel on which they are committed, or that of the parties to them.
2. WHEN JURISDICTION OF, WILL BE DECLINED.—Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice would be as well done by remitting the parties to their home forum.
3. WHEN NOT.—But where the suit is between foreigners, who are subjects of different governments, and therefore have no common home forum, the jurisdiction will not be declined.

Before DEADY, District Judge.

The facts appear in the opinion of the Court.

John H. Woodward, for libellants.

William H. Effinger, for defendants.

DEADY, J. The libellants, Otto Bernhard, a subject of the Emperor of Germany, Morino Henrico and Morris Rock, subjects of the King of the Austrias, and Clement d' Baudillion, a subject of the Republic of France, bring this suit against the defendants, Francis Creene and David

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Jenkins, British subjects, and master mate of the British ship *City Camp*, for alleged beatings and cruelty committed by them upon the libellants during the voyage from Montevideo to this port. It is alleged in the libel that the libellants shipped on the *City Camp* at Montevideo about July 29, 1874, for a voyage to the port of Portland, Oregon, where they arrived in due time, and where the said vessel and the libellants and defendants now are.

The defendants except to the libel, and allege it ought not to be maintained for the following reasons: 1. The vessel is a British ship, and the libellants are foreigners, and not citizens of the United States or residents thereof. 2. The alleged wrongs occurred on the high seas, and beyond the jurisdiction of this court. 3. The libellants, prior to the bringing of this suit, voluntarily left the vessel, and "have refused to do any service therein;" and 4. "Defendants are not liable to any suit or demand of the libellants, save and except in the courts and tribunals of Great Britain."

At the same time the vice-consul of Her Britannic Majesty, at the port of Portland, filed a protest against the jurisdiction of this court for substantially the following reasons: 1. The vessel is a British ship, and the defendants are British subjects, and the alleged wrongs having occurred on the high seas and "beyond the local jurisdiction of the courts of admiralty of the United States," ought of right to be tried in the courts of Her Britannic Majesty." 2. The detention of the defendants may result in the detention of the vessel and serious injury to her owners, who are British subjects. 3. The vice-counsel has, "at the instance and upon the information and examination of libellants and others of the crew of said vessel," entered upon the examination of this matter, and "has initiated and set on foot already, steps to convene a consular court of inquiry into the various matters and things in said libel alleged;" and that the trial of this cause in this court "might, and would call in question the official actions of a British consular court in regard to British subjects, and that such court, for any such official actions, is alone responsible to its own government."

The libellants answer the protest of the vice-consul, denying his right to interfere in their behalf; that they desired to submit the matter in controversy to any consular court; that any such court had been convened or taken any action in the premises, or was competent to give the relief sought; and as to the rest of the allegations in the protest they aver a want of knowledge in the premises, but supposing them to be true, say they are immaterial, and constitute no defense to this suit.

The case was heard on the exceptions and protest. The former are in the nature of special demurrers and set up no new fact. The additional facts set up in the protest, so far as they are denied or qualified by the answer thereto, are not before the court. The exceptions and protest occupy substantially the same ground, and the questions arising upon them will be considered together.

Two questions arise in the case and were argued by counsel: 1. Has this court jurisdiction of a tort committed upon the high seas? 2. Is this a case for the exercise of such jurisdiction, notwithstanding the protest of Her Britannic Majesty's vice-consul?

The jurisdiction of this court in cases arising *ex delicto*, depends upon locality—the place where the cause of action arises. Its jurisdiction in this respect extends to the high seas, without reference to the nationality of the vessel on board of which the tort may have been committed or that of the parties to it.

The Constitution provides, Art. 3, Sec. 2, that “the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction;” and section 9 of the judiciary act (1 Stat. 76), provided that “The district courts * * * shall also have exclusive original cognizance of *all* civil cases of admiralty and maritime jurisdiction * * * within their respective districts, as well as upon the high seas.”

“‘Cases of maritime jurisdiction’ must include all maritime contracts, torts and injuries, which are in the understanding of the common law as well as the admiralty, *causæ civiles et maritimæ*.” (*De Lovio v. Boit et al.*, 2 Gal. 471.)

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“Admiralty jurisdiction in cases of tort depends entirely upon locality. * * * That torts committed upon the high seas are within the jurisdiction of admiralty is certain.” (2 Par. on S. & A., 247.)

In cases of tort, jurisdiction “is exclusively dependent upon the locality of the act.” Maritime torts are such as are committed on the high seas.” (*Thomas v. Lane*, 2 Sum. 9.)

“Cases of tort on the high seas *super altum mare*, have always been held, even in England, to be within the jurisdiction of the admiralty.” (Ben. Ad., sec. 308.) “Cases of assault and battery, imprisonment, or other personal injury or ill usage, arising between master or officers on the one hand, and seamen or passengers on the other, are clearly within the admiralty and maritime jurisdiction.” (Id. sec. 309.)

In general, an action *in personam* for an injury to person or personal property is transitory, and may be maintained in the courts of any country where the parties may happen to be, unless the law of such country otherwise provides. There is nothing in the fact that the wrong was committed without the territorial limits of the sovereignty to which the court belongs, or in the alienage of the parties, which, of itself, prevents the court from taking jurisdiction.

Congress has given this court jurisdiction of “all cases of admiralty and maritime jurisdiction,” whether arising within the territorial limits of this district or “upon the high seas.” That includes this case. It is a cause civil and maritime, and arose “upon the high seas.” There is no intimation in the act granting the jurisdiction that the parties to the case must be American citizens. Neither is any such limitation of the jurisdiction suggested by any of authorities cited.

The case of *U. S. v. Kessler*, 1 Bald. 15, cited by counsel for defendant upon this question is not in point. That was an indictment for robbery and piracy upon the high seas committed on board a foreign vessel. The court held, that under the act of Congress defining and providing for the *punishment* of such offenses, it had not jurisdiction

when the offense was committed on board a foreign vessel. Now the judiciary act (*supra*) does not confer jurisdiction upon the district courts of *all* crimes committed upon the high seas, as in the case of causes civil and maritime, but only of such as shall be cognizable under the authority of the United States; or in other words, of only such crimes as Congress shall define and provide for the punishment of.

There is no doubt of the jurisdiction of the court. Is there anything in the circumstances of the case which should induce the court to decline the jurisdiction. In Par. on S. & A., 226, the rule is stated as follows: "In this country it seems to be settled, after some controversy, that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their home forum.

In *The Steamship Russia*, 3 Ben. 471, the court took jurisdiction of a libel for collision in the harbor of New York, between an Austrian and a British ship. In the course of the opinion, Blachford, J., (p. 476) said, "the principle upon which the court of admiralty proceeds in determining, in any case, whether to exercise such jurisdiction or not, is to inquire whether the rights of the parties will best be promoted by retaining and disposing of the case, or by remitting it to a foreign tribunal." (194 Shawls, 1 Abb. Ad. R. 317, 323 to 326.) I am not aware that jurisdiction in case of collision, has ever been declined by any court of admiralty, either in the United States or Great Britain, because the two colliding vessels were the property of foreign subjects."

In *The Jupiter*, 1 Ben. 536, the court took jurisdiction of a libel for collision upon the high seas between two foreign vessels, whose owners were subjects of foreign governments and residents of foreign countries.

Admitting for the present, the proposition of counsel for defendants, that the libellants must be regarded as British subjects because they shipped as seamen on a British ves-

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sel, what is there in the circumstances of this case, which requires the court to decline the jurisdiction? The libellants have performed their contract with the ship and been discharged from it. The voyage so far as they are concerned, is at an end. It neither began nor ended in a British port.

On the voyage, the defendants were guilty as alleged, of gross personal wrongs to the libellants. To decline the jurisdiction and require the libellants to follow the defendants to a British port, would be a mockery of justice. The voyage of the libellants terminated at this port by the contract of the parties. Where the voyage is broken up or at an end, a court of admiralty never declines to exercise jurisdiction in a suit by the seamen for wages earned or wrongs suffered during the same.

But these libellants are not British subjects in fact, nor is there any reason or rule of law which requires this court to so regard them in this suit. In *The Two Friends*, 1 Rob. 271, which was a suit against an American ship and cargo for salvage, Sir William Scott denied that British subjects who had shipped on this vessel in an American port for the voyage to England, were to be regarded as American seamen.

As to the protest of the vice-consul, I do not find in it any sufficient reason for declining the jurisdiction. He is not the representative of the libellants, nor authorized to speak for their governments, because they are not British subjects. Practically they are residents of and domiciled in this country. They came here from the Argentine Republic on a voyage which, as to them, terminated here. The parties cannot be remitted to a home forum, for being subjects of different governments there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found. Such is this court.

Neither is the probable detention of the vessel any reason why this court should decline to do justice to these suitors. If the owners have committed their vessel to the care of a master and mate who are detained in foreign ports to an-

swer for injuries done to third persons, it is their misfortune—it may be their fault—certainly it is no fault of these libellants, and they ought not to suffer for it or be delayed or hindered on account of it, in seeking redress for their alleged wrongs.

The Court which the consul is about to organize, to inquire into these matters, has not yet been organized, and if it was a case of concurrent jurisdiction, the jurisdiction of this court having first attached would be thenceforth exclusive. But this consular court, or rather “naval court,” as it is called in the regulations, has no jurisdiction over this claim of the libellants or power to give them relief. It is a court or board of inquiry, convened for the purpose of ascertaining whether certain *crimes* against British law has been committed on the vessel, and if so, send the accused parties, with the witnesses, home for trial. Suppose this naval court find that the defendants were guilty of an aggravated assault or assaults upon the libellants, and is able to send them home for trial, how does that affect the claim of the libellants? The defendants may be required to answer both *civiliter* and *criminaliter* for acts injurious to others. In the one case, the proceeding is a civil suit by the party injured for damages for the injury. In the other, it is a prosecution by the public to punish the party for the commission of an offense against society. The trial of this suit in this court in no way “calls in question the official action” of such naval court, even if it had already taken action in the premises. For the purpose of which it will inquire into the conduct of the defendants towards these libellants, this court has no right to take cognizance of the matter. On the other hand, concerning the redress sought to be obtained by this suit against the defendants on account of such conduct, that tribunal has neither duty nor authority.

In *Putch v. Marshall*, 1 Curtis, 452, the court took jurisdiction of a libel for a tort by a seaman against the master of a British vessel, notwithstanding the protest of the British consul: “That an investigation of some of the alleged causes of damages must call in question official acts

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and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government." In passing upon this point, the court, Curtis, J. (p. 455), says: "It is true this court should not call in question a British consul for his official acts respecting the crew of a British vessel in a foreign port. * * * But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen, by imprisonment in a foreign jail, is not to be here investigated."

Upon the whole, I think this is a very clear case in favor of exercising the jurisdiction. In the language of *Patch v. Marshall*, *supra*, "to require these libellants to follow these defendants over the world, until they can find them in a British port would practically deprive them of all remedy I do not think any considerations of public convenience, or the comity extended by the courts of admiralty of one country to those of another, have any applicability to such a case."

The protest and exceptions are overruled.

THE UNITED STATES v. J. B. HARKER.

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 16, 1874.

1. EXPENSE OF MAKING ARREST IN CRIMINAL CASES.—By paragraph 18 of section 829 of the R. S., the marshal is entitled to charge as part of the expense of serving a writ in a criminal case, a per diem paid his deputy, not to exceed two dollars per day.

Before DEADY, District Judge.

Appeal from the taxation of costs by the clerk.

Rufus Mallory, United States Attorney.

Adlison C. Gibbs, for the defendant.

DEADY, J. On November 25, 1874, the defendant was convicted by the judgment of this court, upon the plea of guilty, of being engaged in the business of a dealer of manufactured tobacco, without having paid the special tax therefor, as required by law, and sentenced to pay a fine, and the costs of the action to be taxed.

The clerk taxed the costs of the United States at \$55.70, from which taxation the defendant appeals to the court, and asks that the item of eight dollars allowed the marshal for per diem paid deputy W. F. Williams, for two days employed in arresting the defendant, in addition to his actual expenses for travel and fee for service of the warrant, be disallowed.

Paragraph 18 of section 829 of the R. S. provides that the marshal shall be entitled, "For expense while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars per day, in addition to his compensation for service and travel."

The compensation for serving the process or warrant in this case—that is, taking the defendant into custody upon it after he was found or reached, is fixed by the first paragraph of this section at two dollars. The expenses incurred in traveling from the place where the writ issues to the place where the defendant is arrested, is provided for in the last paragraph of this section; which directs that the marshal may, at his election, receive mileage for such travel or his "actual traveling expenses."

But compensation for the *time* employed in traveling to make an arrest, is a different matter and a very important one to the marshal. It may take a week's travel to make an arrest in this district. No person can be found to undergo this labor and loss of time, to make an arrest, for his mere actual traveling expenses and the fee for serving the writ in case an arrest is made. The time employed in making an arrest is also to be paid for at not exceeding two dollars per day, taking into consideration the value and responsibility of the duty to be performed. This expense is specially provided for in paragraph 18, *supra*, which enacts

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that the marshal shall receive on that account a sum not exceeding two dollars per day. The traveling expenses and the fee for making the service are prescribed in the last paragraph of the section; and it is stated in paragraph 18 that the expense therein provided for is "in addition" to these. The only or most manifest expense to which this paragraph can refer, is the expense incurred in employing a deputy at a reasonable per diem, in addition to his traveling expenses and fee for service, to make the arrest.

The marshal cannot make all or but few arrests in person, and therefore must employ a deputy to perform the service. This he cannot be expected to do unless he pays the deputy for the time actually employed. This per diem or compensation of the deputy is a necessary expense of serving the warrant. It is therefore incurred by the marshal in making or endeavoring to make an arrest, and is provided for in paragraph 18, *supra*.

Section 837, R. S., having provided that the marshal of this district shall receive double fees, the maximum sum allowed for this expense in this district is four dollars per day. I do not think, as a rule, that this is an unreasonable allowance per day for the services of a proper person while employed in traveling over the country by any and all modes and in all seasons, upon the responsible and, sometimes, hazardous duty of making arrests in criminal cases.

The motion is denied, and the taxation of the clerk affirmed.

Points decided.

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IN RE CALIFORNIA PACIFIC RAILROAD COMPANY,
AN ALLEGED BANKRUPT.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 18, 1874.

1. BANKRUPT ACT APPLICABLE TO RAILROAD COMPANIES. — *Held:*

1. That the question of the constitutionality of the provisions of the Bankrupt Act which apply to persons other than merchants and traders is not longer open to discussion. 2. That it has never been decided that a "law on the subject of bankruptcy," within the meaning of the Constitution, must provide for the discharge of all persons subject to its provisions. 3. That railroad corporations are comprehended within the words "moneyed business or commercial corporations." 4. That the court has authority to inquire into the value of securities held by creditors of the alleged bankrupt, in order to ascertain whether the debts due the petitioning creditors are of the amount required by the act as amended—and that a secured creditor has a provable debt within the meaning of the act. 5. That the act declares that the word "person" shall include corporations, and service is therefore to be made personally on a corporation by delivering a copy of the petition and order to show cause to its head or principal officers, and the "usual place of abode" must be construed to mean the principal place of business where alone it can be said to reside. 6. That there is no provision of law, authority, or precedent, which requires that the authority under which an agent of the petitioning creditor's acts should be set forth; that the amended act provides that there need only be five signers, and allows both the signing and the verification to be done by an agent, when the first five signers, or any of them, are absent. 7. That by the sworn statements of the agent, as contained in the two petitions, it appears that one-third of the creditors have not united in the petition for an adjudication. The court is at liberty to examine the petition for an injunction, inasmuch as it might have been incorporated in the petition for an adjudication, and come to a conclusion on the facts therein stated, even though the petition for adjudication contains an explicit and positive averment that the debts due the petitioners amount to at least one-third of all the debts provable against the debtor. A debtor ought not to be compelled to file a full list of his creditors, when it appears from the sworn statements of the petitioning creditors that the requisite amount and number have not petitioned. Petitioning creditors allowed ten days further time, in which to obtain the consent of others to join in the petition.

Before HOFFMAN, District Judge,

H. H. Haight & George Cadwalader, for petitioner.

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S. W. Sanderson, Robert Robinson, Samuel M. Wilson, John B. Felton, McAllisters & Bergin, for respondent.

HOFFMAN, J. A petition having been filed praying that the above corporation be adjudged a bankrupt, it appeared specially and under protest, and through its counsel moved that the proceeding be dismissed on various grounds particularly set forth in the exceptions on file.

The cause has been argued at very great length, and with a zeal and ingenuity proportioned to the magnitude of the interests and the importance of the questions involved in its determination.

First. It is objected that the bankrupt act is unconstitutional, in so far as it attempts to subject to its operation any persons other than "merchants and traders." That at the time of the adoption of the Constitution the bankruptcy acts of Great Britain only embraced this class of persons, and that the grant in the Constitution must be construed as limiting this power of Congress to those persons only who were considered by the framers of the instrument capable of becoming or being adjudged "bankrupt."

But this question is no longer open to discussion. Mr. J. Story says (Com. on Constitution, see: 1113): "In the English system the bankrupt laws are limited to persons who are traders or connected with matters of trade or commerce; but this is a mere matter of policy and by no means enters into the nature of such laws."

The only case in which the restricted view of the constitutional grant was adopted (*In re Klein*, 2 N. Y. Leg. P., p. 184), was overruled by the Circuit Court, Mr. J. Catron presiding. In his opinion, that eminent judge observes: "But other and controlling considerations enter into the construction of the power. It is general and unlimited; it gives the unrestricted authority to Congress over the entire subject, as the Parliament of Great Britain had it, and as the sovereign states of this Union had it when the Constitution was adopted." * * * * *

"In considering the question before me, I have not pretended to give a definition, but purposely avoided any

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attempt to define the mere word 'bankruptcy.' It is employed in the Constitution in the plural, and as part of an expression—"the subject of bankruptcies." The ideas attached to the word in this connection are numerous and complicated. They form a subject of extensive and complicated legislation—of this subject Congress has general jurisdiction, and the true inquiry is, to what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors. This is its least limit. Its greatest is the discharge of the debtor from his contracts, and all intermediate legislation affecting substance and form; but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress. With the policy of a law letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily and be discharged without the consent of his creditors, the courts have no concern." (1 How. 278.)

The principles thus clearly enunciated have, so far as I am aware, been uniformly and universally followed by the courts, and they have recently been distinctly adopted and reaffirmed in cases which have arisen under the existing Bankrupt Act. (*In re Silverman*, 4 N. B. R. 522, per Mr. J. Deady; *in re Reiman et al.*, 11 N. B. R. 21, per Mr. J. Blatchford.) The point must therefore be regarded as settled. The exception is overruled.

Second. It is objected that the act is unconstitutional so far as it applies to corporations, inasmuch as it denies to them the right to obtain a discharge in any case.

It is contended that it is of the essence of a bankruptcy law to provide a discharge for all persons brought within its scope, unless that right has been forfeited by the misconduct of the bankrupt; that Congress cannot make a law a "bankruptcy law" by merely designating it as such, nor, under color of passing such a law, assume the power to provide for the collection of debts and to regulate the relations of debtor and creditor throughout the United States; and that, inasmuch as this act prohibits the discharge of

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corporations in any case, it is not as to them a bankrupt law, and is, therefore, unconstitutional.

The answer to this objection is, that it unwarrantably assumes the fundamental proposition on which it rests. I can nowhere find it decided or maintained that a law to be "a law on the subject of bankruptcy," within the meaning of the Constitution, must provide for the discharge of all persons subject to its provisions.

The constitutionality of the act of 1841 was doubted, and even denied, so far as it sought to discharge a debtor and his future acquisitions from debts before its passage, without the assent of a majority of his creditors; but I am not aware that it was contended that it must provide for his discharge, or else it would cease to be "a law on the subject of bankruptcy."

By the bankruptcy law of 1841, every debtor could be discharged without payment in whole or in part, and without the assent of his creditors. With respect to this feature of the law, Chancellor Kent observes: "The provision in the Bankrupt Act which rendered it a general insolvent act, and was the one almost exclusively in operation, gave occasion to serious doubts whether it was within the true construction and purview of the Constitution, and it was that branch of the statute that brought this system, and I think justly, into general discredit and condemnation, and led to the repeal of the law." (2d Kent's Comm. 391.)

The constitutionality of the law was fully upheld (5th Hubb's N. G. R. 317-27); but the question raised was, as we have seen, not whether a bankruptcy law must contain a provision for the discharge of the debtor, but whether it could, constitutionally, contain such a provision except in respect to merchants and traders adjudged to be bankrupts in an involuntary proceeding.

The Bankrupt Act, even if all provisions for the granting of discharges were stricken out, would still retain the most important features of a bankruptcy law, viz.: Those which act upon the debtor *in invitum*. Those provisions are founded on what the author of the bill declared to be "the first principles of all such systems of laws," viz.:

“That when insolvency beyond all reasonable chance of recovery occurs, the administration of the bankrupt's effects belongs to his creditors and not to himself.”

They are also intended for the protection of the creditor against the fraudulent practices and the reckless conduct of his debtors. They are designed to prevent preferences on the eve of failure—the secretion or abstraction of the property for the benefit of the debtor's friends or relatives, to provide that there shall be no transfers which cannot be inquired into, no settlements by an insolvent upon his wife or children which cannot be reached and declared void through the courts of bankruptcy.

To effect these objects the act provides that when a debtor (who need not necessarily be an insolvent) has committed any of the acts of bankruptcy defined in the act, he may be proceeded against in a summary manner. He may be deprived of the possession and control of all his property liable for his debts, and the title thereto vested in an assignee to be selected by his creditors, such title to relate back to the date of the commencement of the proceedings, and to include all property of the debtor, wherever situated in any State of the Union. Only national legislation could attribute such an operation to the assignment. It appears to me that these peculiar and characteristic provisions would be alone sufficient to impart to the law the quality of a “law on the subject of bankruptcy,” and that it would remain such, though discharges should in all cases be withheld.

But, waiving this consideration and assuming for the sake of argument, that a law which failed to provide for the discharge of debtors, in any case, would not be “a law on the subject of bankruptcies,” it does not follow that to be a law of that description it must provide for discharges in all cases where the right has not been forfeited by misconduct.

Before the adoption of the recent amendments the bankrupt was denied his discharge except with the assent of a majority in number and value of his creditors, or in cases where his assets were sufficient to satisfy fifty per cent. of his debts.

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By the amended act of 1874, the assent of one third of his creditors or the payment of one third of his debts is sufficient.

On a second application, a bankrupt who has already obtained a discharge must obtain the assent of three fourths in value of his creditors, or his assets must be sufficient to pay seventy per cent. of his debts.

If Congress may constitutionally impose these conditions, and its right to do so has not been questioned, where are the limits to the exercise of its discretion? Why may it not require the payment of sixty, eighty or one hundred per cent. of the debts as a condition precedent to a discharge in any case?

The withholding of the discharge in the cases I have mentioned cannot be said to be a punishment for a fault committed. For he who is unable to pay one half or one third of his debts may be as blameless as he who is able to pay sixty or eighty per cent. It cannot always be imputed to him as a fault that he has suffered a total instead of a partial financial shipwreck.

If, then, Congress may, in its discretion, attach any conditions it sees fit to the right to obtain a discharge, it may attach impracticable ones, or ones that can rarely be complied with, or in particular cases it may refuse the right altogether; for a construction of the constitutional grant of power must be unsound which concedes to Congress the right to refuse a discharge, in effect, while it denies the right to refuse it in terms.

It is unnecessary to advert to the reasons by which Congress no doubt was governed in discriminating between corporations and natural persons, in respect to discharges. They are obvious, and seem abundantly sufficient to justify the provisions of the law.

Nor need I dwell on the pernicious consequences, especially in this State, of a construction of the law which would exempt all corporations whatever from its operation.

But, if the considerations I have suggested be not so conclusive as I think they are, they derive great support, if not from express decisions, yet from the tacit recognition of

the validity of the law by all the courts of bankruptcy before which proceedings by or against corporations have been taken.

The books contain about forty reports of such cases in the District and Circuit Courts, and in the Supreme Court of the United States. In no one has the objection I have been considering been noticed.

I do not claim that this general acquiescence in the validity of the law has the authority of an express judgment on the point; but surely such a tacit admission and consent, *semper ubique et ab omnibus*, are entitled to great weight in determining a *doubtful* question of constitutional construction, even conceding this question to be such. I have considered this point at some length, because it was argued with great earnestness and zeal and with great apparent confidence in its soundness.

The objection is overruled.

It is further objected that railroads are not comprehended within the words, "Moneyed business or commercial corporations" contained in the act.

I do not deem it necessary to discuss this question, as I consider it settled by authority.

In the case of *Winter v. The Iowa, Minnesota and North ern Pacific Railroad Co.*, 7 N. B. R., 291, Mr. J. Dillon, Circuit Judge, observes:

"The question whether railroad companies are within the operation of the act has several times been before the courts and, so far as the researches of counsel have extended, it has been uniformly decided that they are. (*Alabama R. R. Co. v. Jones*, 5 N. B. R., 97, per Woods, Circuit Judge; *Adams v. R. R. Co.*, 4 id., 314, per Shepley, Judge.) Approved and doctrine reaffirmed by Clifford J. in *Sweet v. R. R. Co.*, 5 id., 234. Concurring in the views expressed in the opinions in these cases, it is not necessary to enter into an extended discussion of the question, or to repeat the arguments by which the conclusion reached is sustained."

This decision is followed in several subsequent cases which it is not necessary to cite.

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The only adverse authority is a notice of an oral decision rendered by Mr. J. Durell, late District Judge for the District of Louisiana. The grounds on which this decision is based are not stated. I do not consider that a single case decided by a District Judge is sufficient to countervail the authority of so many cases decided by Circuit Judges, and in one instance by a Justice of the Supreme Court. I shall therefore dismiss the point with one further observation.

It was urged that railroad companies are the most important corporations in the United States. That from various causes the earnest attention of the country has been drawn to a consideration of their rights, duties, liabilities, and their relation to the State and National Government.

It is therefore argued that if Congress had intended to include them within the provisions of the act, they would have been mentioned by their popular and characteristic name. But I think the fact stated justifies precisely the opposite inference. That the question, whether railroads should or should not be subjected to the provisions of the act, was not overlooked by Congress, must be conceded. That the framers of the act had a certain and definite intention with regard to them, is clear.

If, then, it had been intended to withdraw them from the operation of the act, they would have been excepted by name. It is inconceivable that Congress, with its attention drawn to the subject, and alive to its importance, should, if it had intended to exempt them, have used words which, in their natural and popular, as well as their legal sense, as interpreted by the courts, necessarily include them.

The exception is overruled.

It is further objected that the debts due the petitioning creditors being *secured* debts, are not "provable" within the meaning of the thirty-ninth section of the act.

This objection is founded on the language of the twentieth section.

That section provides in substance that a creditor whose debt is secured by mortgage or other lien, on the bankrupt's property, "shall be admitted as a creditor only for the balance of the debt after deducting the value of such property

to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct; or the creditor may release and convey his claim to the assignee upon such property, and be admitted to prove his whole debt." * * * "If the property be not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

It is urged that by this section the secured creditor is not allowed to prove his debt until the value of the security is ascertained, in the manner prescribed by the act, unless he surrenders his security—and that this value can only be ascertained after adjudication and the appointment of an assignee; until then he has no "provable debt."

But, to ascertain the true meaning of this section, other provisions must be resorted to.

Section 22 provides that every creditor desiring to be admitted to share in the estate of the bankrupt, by virtue of a debt owing to him from the bankrupt, must exhibit his demand in a deposition setting forth the consideration thereof, "and whether any and what securities are held therefor."

In form 21, the mode in which "proof of debt with security" shall be made, is specially prescribed by the Supreme Court. By this form the creditor is required to set forth "a particular description of the debt, and also of the property held as security, and the estimated value of such property."

It is apparent from these provisions that the secured creditor not only may, but must prove his debt before he can be recognized as a creditor, with or without security.

Upon the proof so made a hearing may be had, testimony taken and an adjudication made. That adjudication, if in favor of the creditor, will establish the fact and amount of the bankrupt's indebtedness to him, and the further fact that he has a valid lien on the property claimed as security.

The *value* of that security is to be ascertained subsequently, as provided in section 20.

It has accordingly been held, where a secured creditor applied to the court for an order for the sale of the security held by him, that such order would be withheld until he

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had proved his debt under the twenty-second section and established the existence of the debt and that the property claimed as security was in fact pledged to him. (*In the matter of E. Bigelow*, 1 B. R. 632.) Construing, then, the twentieth and twenty-second sections together, the meaning of the former becomes clear and unmistakable.

“As used in that section, the word ‘debt’ means the amount upon which the dividend is to be computed, and the phrase ‘prove his debt’ is equivalent to the phrase ‘share in the distribution of assets.’” (Per. Mr. J. Benedict, Id.)

This construction of the twentieth and twenty-second sections of the act given by Mr. J. Benedict, in the case above cited, and which is the leading case on the subject, has been adopted by the courts with almost entire unanimity.

In re Stansell, 6 B. R. 184, Emmons, Circuit Judge, says: “I concur fully in the interpretation which reads section 22 and forms 21 and 25, as requiring all creditors, secured and unsecured, alike to prove their claims, and which construes the last clause of section 20, prohibiting the proof of any part of the secured claim to mean only that the creditor shall not be admitted to share in the assets except for the just balance beyond his security.” And for this the learned judge cites a very large number of authorities, and quotes with approval the language of Dillon, Circuit Judge, to the effect that “the debt of a mortgagee is provable and such proof, does not waive his lien.”

The only adverse decision which has been referred to, is that of Mr. J. Blodgett. (*In re Frost*, Chicago Leg. News, Oct. 31, 1874; 11 N. B. R. 69.)

In that case, the learned judge holds that by “debts provable under the act, Congress meant debts unconditionally provable. For this position he cites no authority; nor does he refer to any one of the numerous cases I have mentioned above.

He seems to have been led to the conclusion he adopts by the desire to frustrate any collusion between the debtor and a sufficient number of his secured creditors, to prevent the unsecured creditors from obtaining the requisite number and values to enable them to file a petition.

But any debtor who can secure the co-operation of more than three-fourths in number, or two-thirds in value, of his creditors, may put it out of the power of the remainder to procure his adjudication. By the provisions of the act they have an absolute veto on the proceeding. The exclusion of the secured creditors from the computation, may, in some cases, mitigate the evil, if it be one; but it will be merely a palliative and not a preventive. Nor will the practical operations of the rule laid down by the learned judge be found entirely satisfactory.

The enormous proportions which the indebtedness of railroad corporations has assumed in this country is well known. It exists almost universally in the form of bonds secured by mortgages on the roads.

Where, as must often be the case, the indebtedness so secured exceeds the value of the road, the mortgagees are virtually its owners. It may be for their interest, and they may unanimously desire to allow the companies to continue in the possession of the road, and to look to an increase of population and the development of the country for their ultimate reimbursement. But if secured debts are not "provable" debts, and the bondholders are excluded from either side of the computation, it will be in the power of one-fourth in number and one-third in value of the creditors to whom the floating debts of the company are due, to put it into bankruptcy, and this when the total floating debt may be insignificant in amount compared with the debts due to the bondholders. It appears to me that in deciding so vital a question, the bondholders should have a voice-proportioned to their interests.

But whatever be the force of this suggestion, I think it clear from the language of the twenty-second section and forms 21 and 25, and from the overwhelming weight of authority, that a secured creditor must be deemed to have a "*provable*" debt within the meaning of the thirty-ninth section of the act.

The question then arises: To what amount is the secured debt to be deemed provable? In replying to this question, one of two alternatives must be adopted. The debt must either be reckoned at its full amount, irrespective of the

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value of the security, or else at that amount less the value of the security.

But it is apparent that it would be as unjust and as absurd to allow a creditor, who is fully secured, and who may be considered as virtually paid, inasmuch as he holds in hands the means of payment, to control a proceeding which has for its object the prevention of frauds by the bankrupt in respect of his other property, and its equal distribution amongst his other creditors, as it would be in the contrary case to deny to the creditor, whose security is little more than nominal, and who looks to the general assets for the payment of the greater part of his debt, any voice in the matter.

Reason and justice seem to require that the rights of each should be proportionate to his interests involved, and that the amount at which the debt of every secured creditor is to be reckoned should be ascertained by first deducting the value of the security.

But it is objected that this mode of ascertaining the amount of the debts is impracticable, for no power is given to the court to determine the value of the security for such a purpose and at this stage of the proceeding.

I admit that for the purpose of ascertaining for what amount the secured creditor shall share in the distribution of general assets, or in the language of section 27, for what amount his debt shall be considered "proved and allowed," the provisions of the twentieth section must be resorted to.

But it does not follow that for the purpose of ascertaining whether creditors to the requisite amount have joined in the petition, the court may not provisionally make the necessary inquiry.

That the court was not deemed by Congress incompetent to make it is shown by the provisions of the forty-third section, in relation to "composition with creditors." That section provides that "the value of the debts of secured creditors above the amount of such security to be determined by the court shall, as nearly as the circumstances shall admit, be estimated in the same way."

The powers conferred upon the District Courts by the Bankruptcy Act are of the most comprehensive character.

Section 1 provides that the several district courts of the United States be, and they hereby are, constituted Courts of Bankruptcy, and they shall have original jurisdiction, in their respective districts, in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * *

“And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy—of the assets of the bankrupt—to the ascertainment and liquidation of the liens and other claims thereon, specific to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to all acts, matters and things to be done, under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.”

By the second section, jurisdiction, concurrently with the Circuit Courts is given, “of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee.”

The jurisdiction thus attributed to the District Courts is more varied and extensive than that conferred by all other acts of Congress combined. It was evidently the intention of Congress to establish a complete system of bankruptcy proceedings, and to confer upon the “Courts of Bankruptcy” constituted by the act, plenary jurisdiction over the whole subject and extending to “all matters, acts and things to be done under and in virtue of the bankruptcy.” In the exercise of this jurisdiction these courts have the authority to do every act necessary and proper to carry into effect the policy and purposes of the law.

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The strict rules of construction which are applied in cases where a special statute gives to a court power to do a particular thing, such as to open streets, to condemn property, to determine contested elections and the like, and which prescribes the precise mode in which the power shall be executed, have no application to a case like the present, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose.

On this point we are not without authorities to guide us. The District Courts have, in numerous instances, issued injunctions against secured creditors seeking to enforce their security by foreclosure in the State courts, or by a sale under a power contained in the mortgage, or by a trustee appointed in a trust deed. (See *Markson et al. v. Heany*, 4 B. R. 510, and cases cited; *Phelps v. Sellick*, 8 B. R. 390.) And yet no power to issue injunctions in this class of cases is expressly conferred by the act.

In the case of *In re Alexander*, 4 B. 178, the point under consideration was expressly decided. The question was made whether the debt due a secured petitioning creditor amounted to \$250 in value. It was objected that, until an assignee was appointed, the value of the security could not be legally ascertained. But the court (per Mr. J. Lowell) held that this was too strict and literal a construction of the statute, and that it might inquire into the value of the security in order to ascertain what was the amount of indebtedness practically unsecured. "This," the court observes, "will be a question of fact like any other, and no more difficult to decide than such as often arise."

So where it was claimed that the alleged bankrupt had counter-claims against the petitioning creditor which would reduce the amount of the debt due below \$250, the court proceeded to inquire into the validity and amount of the counter-claims, notwithstanding that such an inquiry involved an assessment of unliquidated damages. (*In re Osage V. & So. Kansas R. R. Co.*, 9 B. R., p. 281.)

For these reasons, and on these authorities, I conclude that the court has authority to inquire into and determine what is the value of the securities held by the creditors of

the alleged bankrupt, in order to ascertain whether the claims of the petitioning creditors are of the amount required by the statute.

It is further objected that this court has no jurisdiction over the respondents and can acquire none, inasmuch as the Bankrupt Act provides no mode of serving the petition and order to show cause, upon a corporation.

This objection admits the intention of Congress to confer jurisdiction over corporations, but it claims that that jurisdiction must fail, by reason of the accidental omission to provide for its exercise.

The objection proceeds upon the assumption that the Courts of Bankruptcy constituted by the act are special courts of limited and strictly defined powers, and that they can exercise no authority derived from other acts of Congress, and not in terms conferred by the Bankruptcy Act. The validity of that assumption I have already discussed. The views heretofore suggested apply with equal force to this question now under consideration.

It may be stated in addition that the act declares that the word "person" shall include "corporations," and I see no insuperable difficulty in construing the act to mean, when directing service to be made on the debtor "personally," or "by leaving the order at his last or usual place of abode," that service is deemed to be made "personally," on a corporation, when it is effected in the only mode in which a service can be made on such artificial persons, viz.: by delivering it to its head or principal officers, who are its visible representatives; nor do I consider it wholly inadmissible to construe the words "usual place of abode" to mean, in regard to corporations (*ut lex magis valeat quam pereat*), their principal place of business, where alone they can be said to abide.

But if these interpretations be rejected as strained and far-fetched, then I am clearly of the opinion that the court is at liberty to resort to other acts of Congress, the "Judiciary," the "Process" act, and the late "act for the better administration of justice," for authority to employ the means necessary to the exercise of the jurisdiction so clearly conferred upon it.

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The inference to be drawn from the omission by Congress to prescribe in the Bankrupt Act the mode in which corporations should be served, is not that it was an accidental blunder by which the operation of the act with respect to compulsory proceedings against corporations were defeated, but rather that it indicates that Congress intended that where the Bankrupt Act was silent, the general laws providing for the practice and proceedings in the courts of the United States should apply.

If the objection urged in the present case be valid, I see not why the same objection might not be urged in the circuit or district courts in all suits by an assignee against a corporation indebted to the bankrupt. The purpose of the act would thus in a great measure be defeated.

I find in no reported case a hint or intimation that the Bankrupt Act is to be construed to be a practice act in bankruptcy cases, and that only proceedings therein expressly authorized can be adopted. But there are several cases which can only be supported on a contrary supposition.

In *In re Mendenhall*, it was held that the District Court will order the production of books and papers at the summary hearing on the return day of the order to show cause, and that the fifteenth section of the Judiciary Act is applicable to such cases; and if not, the general scope of the Bankrupt Act gives plenary power. (9 N. B. R., 285.)

In *In re De Forrest*, it was held that where the debtor denied the alleged acts of bankruptcy and demanded trial by jury, the court had the same power over verdicts rendered in such cases as courts of common law, and may, on proper cause shown, set them aside and order a new trial. (Id. 278.)

And in *Knickerbocker Insurance Company v. Comstock*, it was decided by the Supreme Court that the rulings of the District Court in trials of this description may be reviewed by the District Court on writ of error, and that the writ must be sued out according to the provisions of the Judiciary Act, except that it must be applied for within ten days.

It was further held in that case that the proceeding by a creditor against an alleged bankrupt is essentially a suit

at common law, and must be governed by the rules applicable to such suits. (8 B. R., 145 S. C.; 16 Wall. 258.)

If, then, this proceeding be in the nature of a suit at common law, it falls within the language and meaning of the thirty-second general order in bankruptcy, adopted by the Supreme Court by the authority of the act.

That order provides that in "the proceedings at law instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of the Circuit Court regulating the practice and procedure in cases at law shall be followed as nearly as may be."

It is not denied that the service made on the respondent in this case would have been valid and effectual if made in a suit at common law in the Circuit Court.

If to those considerations we add the fact that jurisdiction over corporations has been exercised since the passage of the act in almost every district of the United States, without hesitation or question as to the power of the court to serve them with process, no doubt will, I think, remain as to the disposition which should be made of the objection.

The exception is overruled.

It is further objected, that the authority under which the agent of the petitioning creditor acts is not set forth in the petition. I have found no provision of law, authority or precedent which requires this to be done. It is also objected that the petition is not signed by the creditors personally.

With respect to the signing and verification of the petition, the act provides that "the petition of creditors, under this section, may be sufficiently verified by the oaths of the first five signers thereof, if so many there be, and if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents of such signers."

The effect of these provisions is two-fold: First, to dispense with a verification by any greater number than the

first five signers; second, to allow both the signing and the verification to be done by an agent, when the first five signers, or any of them, are absent.

But if the personal signatures of all the other petitioning creditors are required, this provision, evidently intended for the benefit of absent creditors, would be, to a great extent, defeated. And why should they be compelled to sign personally, when the first five, who alone are required to verify, may both sign and verify by attorney? I think it plain that the act intended to allow all the creditors who might be absent from the district to sign by attorney.

Under the practice said to prevail generally in the bankruptcy courts, the verification may be defective in not alleging authority from the creditors to sign and verify the petition. The verification merely avers that F. F. Low is "the duly authorized agent and attorney of the petitioners." But this defect, if it be one, may be amended. (*In re Simons*, 10 B. R. 254.)

And, finally, it is objected that the petition for adjudication, and the petition for an injunction presented and filed simultaneously therewith, show that the debts due the petitioning creditors do not amount to one-third of all the debts of the respondent provable under the act. The petition avers that the aggregate amount of debts held by the petitioning creditors is \$1,500,000, for which they hold security to the value of twenty per cent. Deducting twenty per cent. from the amount of the debt, we have \$1,200,000 as the amount to be reckoned for the purpose of this inquiry.

The petition also avers that the respondent is indebted in the sum of \$3,500,000, of which the \$1,500,000 due to the petitioning creditors forms a part. Deducting twenty per cent. from this amount we have \$2,800,000 aggregate debt provable under the act. It is also averred that the respondent is indebted in the sum of \$1,600,000 on certain bonds issued by it. If this sum be added to the \$2,800,000 already ascertained, we have \$4,400,000, of which the \$1,200,000 held by petitioners is not one-third. It is claimed that the sum of \$1,600,000 must be left out of the

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computation, inasmuch as the petition avers that it is secured, which must be taken to mean fully secured.

I very much doubt whether such a construction of the language is admissible. I waive the point, as the defective averment may be cured, if the facts warrant it, by amendment. At the time of filing and presenting to the court the petition for adjudication, there was also filed and presented a petition for an injunction to restrain the respondent from carrying into effect an arrangement for substituting mortgage bonds for certain income bonds so-called, heretofore issued by it, to the amount of \$1,000,000, upon which interest to the amount of \$50,000 is now due. These bonds this petition avers to be wholly unsecured. Adding this \$1,050,000 to \$2,800,000 before obtained, we have \$3,850,000, of which the petitioner's debt is not one-third.

But it is urged that the averment in the petition that the debts due the petitioners amount to at least one-third of all the debts provable against the respondent, is positive and explicit, and that the court cannot look to the petition for an injunction to ascertain the true state of facts. But in this view I cannot acquiesce.

The petition for injunction was presented to the court, and an order obtained thereon at the same time with the petition for adjudication. It is signed and sworn to by the same agent of the creditors who signed and verified the latter. It is not suggested that its allegations are untrue. The prayer being for an injunction against the alleged bankrupt, the contents of this petition might have been embodied in the petition for adjudication. (*Irving v. Hughes*, 2 B. R. 61.) I do not think that the circumstance that the allegations are contained in a separate paper would justify the court in closing its eyes to the facts set forth in it.

It is evident from the terms of the thirty-ninth section, that Congress was solicitous to restrict the rights of creditors to put a debtor into bankruptcy, rigorously to those cases where the requisite proportion in number and value united in the petition. Even where the debtor admits in writing that the requisite amount and number have petitioned, the court must still "be satisfied that the admission

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is made in good faith." How can the court be satisfied that the requisite amount and number have petitioned, when by the sworn statement of their agent and attorney it appears that they have not? In cases where the allegation as to the amount and number of the petitioning creditors is denied by the debtor, the court is required by the act to order him forthwith to file a full list of his creditors, with their places of residence and the sums due them respectively. But surely the debtor ought not to be compelled to make such an exposure of the state of his affairs when it appears from the sworn statements of the petitioning creditors on file in the cause that the requisite amount and number have not petitioned.

The exception is sustained, but the creditors are entitled to ten days' further time, within which other creditors may join.

This opinion has extended to a far greater length than I had purposed, or than was perhaps to be desired. The case might have been disposed of on the last point alone. But the other questions considered were elaborately argued by eminent counsel, and they are liable to arise in other cases. The occasion seemed, therefore, a fit one to consider and set them at rest so far as the decision of this court can have that effect.

JAMES GILLESPIE v. JAMES H. CUMMINGS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 21, 1874.

1. PATENTS—MULTIFARIOUSNESS.—Where two separate patents for improvements in the manufacture of brooms owned by the complainant are alleged to have been infringed by the defendant, and the broom manufactured by the defendant appears to be an infringement of both patents, the bill is not bad for multifariousness.
2. SAME.—Where the right to both patents alleged to be infringed for the State of California, has been assigned to complainant, the bill is not bad for multifariousness, because the assignment of one of the patents also embraces other territory than the State of California.

Before SAWYER, Circuit Judge.

J. V. O'Brien, for complainant.

Tully R. Wise, for defendant.

SAWYER, Circuit Judge. This is a suit in equity to restrain the infringement of two certain patents for improvements in the manufacture of brooms, one dated May 10, 1870, issued to William S. Hancock, and the other dated August 2, 1870, issued to James H. Anderson, the right to one of which for the Pacific Coast, and to the other for the State of California, have been assigned to complainants. Defendant demurs for multifariousness: Firstly, on the ground that the infringement of each patent is a separate and distinct cause of action and that the two cannot be joined in the same bill. Secondly, that the assignment of the patent right to the two patents is not for the same territory. Although it might be more directly and specifically alleged, I think it sufficiently appears that the same broom made by the defendant, if an infringement at all, must be an infringement of both patents. There is, therefore, a common point to be litigated, and much of the testimony must, from the nature of things, be applicable to both patents. So, also, the assignment of both patents embraces the State of California. Whatever the rule might be, if the several assignments covered no part of the same territory, these assignments do cover the State of California. I think the bill not bad for multifariousness on either ground. The principles laid down in *Nourse v. Allen*, 3 Fisher's Pat. Cases, 63, and *Central Pac. R. R. Co. v. Dyer et al.*, 1 Sawyer, 641, appear to me applicable.

Demurrer overruled, with leave to answer upon the usual terms.

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Opinion of the Court—Sawyer, C. J.

ANNA R. BIDWELL v. THE CONNECTICUT MUTUAL
LIFE INSURANCE COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 21, 1874.

PLEADING—LIFE INSURANCE POLICY.—Where, by the express terms of the policy, “the proposals, answers and declarations” made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded upon the policy.

Before SAWYER, Circuit Judge.

Beatty & Denson, for plaintiff.*Doyle & Barber*, for defendant.

SAWYER, Circuit Judge. Action upon a life insurance policy. The complaint contains a copy of the policy, but does not set out, either in *hæc verba* or in substance, the “proposals; answers and declarations” made by the applicant upon which the policy was issued. The policy set out contains the following clause: “And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declarations made by the said Alan-son C. Bidwell, and bearing date the fifteenth day of November, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void.” The defendant demurs, on the ground that the complaint is uncertain and insufficient, it appearing upon its face that the entire contract is not set out. I think this point well taken. It is well settled that under the provision of the policy cited, the proposals, etc., are not mere representations made as inducement to enter into a contract, but are warranties and a part of the contract itself. (*Miles v. Conn. M. L. Ins. Co.*, 3 Gray, 580; 1 Big. 173; *Ryan v. World Mut. Life Ins. Co.*, 4 Ins. Law Jour., 37; *Campbell v. N. E. Mut. Ins. Co.*, 98 Mass. 381; *Tibbitt's v. Home Mut.*

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Ins. Co., 1 Allen, 305; *McLoon v. Conn. Mut. Ins. Co.*, 100 Mass, 472; *Kelsey v. Mon. Life Ins. Co.*, 35 Conn. 235; *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa, 227; *Lycoming Mut. Ins. Co. v. Sailor*, 16 Pa. 108; *Rogers v. Charter Oak Life Ins. Co.*, Mss. Sup. Ct., Conn.) The application being a part of the contract, it is necessary to set it out in the complaint, otherwise it does not appear what the contract is. (*Bobbitt v. The L. & L. & G. Ins. Co.*, 66 N. C. 70; 8 Am. R. 494; Steph. Pl. 132; Gould's Pl. Ch., IV, Sec. 28; 1 Ch. Pl. 236.)

The demurrer must be sustained, and it is so ordered.

UNITED STATES v. JOSEPH W. HASKINS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 4, 1875.

1. REMOVAL OF AN OFFENDER UNDER SECTION THIRTY-THREE OF THE JUDICIARY ACT.—An offender, after indictment found in one district, may, under that section, be arrested in any other district, and committed and removed, or bailed, as the case may be, for trial in the district where the indictment was found.
2. IDEM.—A duly authenticated copy of the indictment is sufficient evidence, if uncontradicted, to justify the commitment of the offender, and a warrant for his removal if bail is not given.
3. IDEM.—REMOVAL TO A TERRITORY.—For an offense against the United States committed in an organized Territory, the offender may be arrested in any district of the United States, and removed to the Territory for trial, if the territorial courts have cognizance of the offense.
4. IDEM.—Territorial courts are "courts of the United States," as that designation is applied in section thirty-three of the Judiciary Act.

Before HILLYER, District Judge.

Proceeding for the removal of an offender from one district to another for trial.

Section 33 of the Judiciary Act enacts: "That for any crime or offense against the United States, the offender may, by any justice or judge of the United States or by any justice of the peace or other magistrate of any of the United States where he may be found agreeably to the

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usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. * * * " (1 St. at Large, p. 91.)

In the corresponding section of the Revised Statutes, section 1014, the phraseology is changed in some respects. In the first clause instead of saying the offender may be arrested for trial before such court of the United States "as by this act has cognizance of the offense," the language now is "as by law has cognizance of the offense."

Section 9 of the organic act of Utah establishes district courts for the territory, and enacts: "And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States." And section 16 provides as follows: "The Constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable." (9 St. at Large, p. 453.) "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places

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as the Congress may by law have directed." (Art. 3, Sec. 2, Con. U. S.)

In this state of the law, Joseph W. Haskins was indicted by a grand jury in the territory of Utah for an offense against the United States—the offense charged being perjury—and a warrant was issued to the marshal of the United States for Utah, for his arrest.

Haskins being found in the State of California, an affidavit was made before the United States District Judge, setting out the finding of the indictment; that it is still pending, and that the defendant is in the State of California; and praying for a warrant for his arrest. Upon this affidavit, and the exhibition of an authenticated copy of the indictment a warrant was issued, and the defendant arrested. At the examination before the judge, the identity of the defendant was admitted, also the authenticity of the indictment, and that it is still pending. No evidence was offered by the defendant. Upon this, the attorney for the United States asks that the defendant be committed or bailed for trial before the court to which the indictment was returned, and if bail be not given that a warrant for his removal, to the territory of Utah, issue.

For the defendant it is claimed that the thirty-third section of the Judiciary Act has no application to proceedings for the arrest and commitment of an offender who has been indicted; that the judge acts under that section as a committing magistrate for the purpose of inquiring whether the accused shall be held to answer before a grand jury. It is also claimed that the above-mentioned section does not and was not intended to apply to a case where it is sought to remove an offender from a district within a State to one within a territory.

The defendant further insisted that the proceedings before the judge have not been conducted "agreeably to the usual mode of process against offenders" in this State; and that a certified copy of the indictment did not show probable cause to believe an offense had been committed by the defendant, and was insufficient evidence, uncontradicted, to justify the arrest in the first instance, or the commitment of the defendant at the examination.

John M. Coghlan, United States Attorney, and G. W. Gordon,
for plaintiff.

H. H. Haight and Delos Lake, for defendant.

HILLYER, J. The first question to be answered is, whether in a criminal case in which the defendant has been indicted in one district of the United States, he can be arrested and committed in another district, in the mode pursued in the present case, and upon such commitment removed to the district in which the crime charged was committed for trial.

While the practice in the several districts has not been entirely uniform, so far as I can find after a somewhat careful search, the propriety of an arrest and removal substantially in the mode pursued by the government in this case, has never been questioned by any judge. If there be any other mode, it is not regarded as the only one or as exclusive of this.

The practice is so stated in Conkling's Treatise, p. 630, by the author, as well in cases of arrest after indictment found as before, if the offense is triable in some other district than that in which the arrest is made. In Murray's Treatise on Proceedings in the United States Courts, p. 29, the course pursued in this case is laid down as the proper one, and neither of these authors regard a commitment as essential, if the proceeding is before the district judge, to justify him in issuing his warrant for the removal of the offender.

In *Ex parte Alexander* (1 Low. Dec. 530), the defendant was arrested and brought before a commissioner of Massachusetts for examination, and the only evidence of probable cause was a certified copy of an indictment returned to the Circuit Court of the United States for Louisiana. No evidence was offered by the defendant. After the defendant had been committed, the District Attorney applied to the District Judge for a warrant of removal, and the question was, whether the course pursued was the true one. The learned judge of the district of Massachusetts held that the proceedings had been conducted properly, and said also

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that there were doubts as to whether the court in Louisiana could issue a warrant to arrest the defendant wherever found. He held further, that a certified copy of the indictment was sufficient evidence to authorize the committing magistrate to commit the accused to be bailed for trial in the district where the indictment was pending.

One Clark was arrested on a warrant issued by a commissioner of New York to answer to a charge of conspiring to defraud the United States in Michigan. A hearing was had; and the proof thereat consisted of a copy of the indictment found in Michigan, with further proof that it was still pending and that a warrant had been issued by the court before which it was found. Upon this the accused was committed. When brought before Judge Benedict on habeas corpus, that learned judge held the evidence to be sufficient and remanded him to the custody of the marshal. In doing so he said that the question was not whether the proceedings in the District Court of Michigan would not have been sufficient to justify the arrest and detention of the defendant had that court seen proper to issue its bench warrant directly to the marshal of New York; that the proceeding seemed to have been an original one in which the indictment was introduced as evidence sufficient to justify the commitment for trial in Michigan. (*Ex parte Clark*, 2 Benedict, p. 540.)

An application was made to the judge of the district of Tennessee, for a warrant to arrest and remove one Jacobi to Arkansas, for a contempt committed in the Arkansas district. Jacobi had not been committed to answer, and it was held that no warrant for the removal of the accused in *any* case can be issued until he has been arrested and imprisoned; and that if the accused offered bail it was his right to be discharged on bail. "My opinion is also," says the judge, "that the certified copy of the proceedings of contempt and the attachment are sufficient not only to authorize the United States attorney to make complaint, but also the issuing of a warrant precisely as a certified copy of an indictment would be in any other case of crime, and also *prima facie* to justify the imprisonment of the defendant if he did

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not give bail." (*United States v. Jacobi*, 4 Am. L. Times Rep. p. 148.) It was also held in *United States v. Shepard* (1 Abbott's U. S. R. 431), that a removal is only authorized after arrest and commitment for want of bail. So that in the last two cases it seems to have been considered that the course taken by the government in the present case is not only the proper but the only one.

There is some correspondence between Mr. Justice Miller and Judge Love of the Iowa district, bearing upon this question, reported in 1 Woolwich, 422. A warrant had been issued by a commissioner in Illinois to arrest the defendant for examination. The warrant and copies of the affidavits used before the commissioner, were submitted to Mr. Justice Miller, in Iowa, for an order to the marshal of Iowa to make the arrest. This course seems to have been taken in conformity with the opinion of Judge Drummond. Justice Miller, however, held that the accused could not be removed before examination in the district where he was arrested. Judge Love agreed with this, and added that his practice was, in cases in which an indictment had been found, to have the accused brought before him for identification, and upon that to issue his warrant for removal without further examination, for, he says: "I hardly suppose we could go behind the indictment."

The language of the statute is, That for any offense against the United States, the offender may be arrested, etc. Nothing is said expressly, or by fair implication, limiting the power to arrest and imprison or bail, to those offenses, only, for which no indictment has been found. The second clause of section 33, does, in my judgment, contemplate an examination before the magistrate, as a prerequisite to removal. But an examination can be had after indictment found as well as before; if after, the indictment can be used as a piece of evidence. Whether in such case the indictment is conclusive, or the merits of the charge may be gone into on the examination, are questions not necessary now to decide, as the defendant did not offer any testimony. The construction given to this section, by so many eminent judges, ought to have great weight, especially as for more than eighty years it does not seem to have been departed from.

I conclude, then, that an offender, after indictment found in one district, may, under this section, be arrested and imprisoned or bailed, as the case may be, for trial in any other district the courts of which have cognizance of the offense. This view is strengthened by the consideration that it is, if not certain, at least extremely probable, there is no other mode by which the defendant can be removed. The act of Congress, respecting fugitives from justice, (1 St. at Large, 302,) in pursuance of Article IV, Sec. 2, U. S. Constitution, provides a mode by which offenders against State and territorial laws, who have fled from justice, may be delivered up to the authorities of the State or Territory demanding them, but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another. If the defendant cannot be reached under this act, and in my judgment he cannot, there remains but one other course possible besides the one adopted in the case now under consideration, that is, for the judge of the district where the indictment was found to issue his warrant to the marshal of this district, where the defendant now is. Such a course has been alluded to in several of the cases above cited, but always with an expression of doubt as to the power of the judge of one district to issue a warrant which will justify the arrest of an offender anywhere in the United States, or a warrant addressed to the marshal of any particular district outside of his own.

Section 27 of the Judiciary Act provides that it shall be the duty of a marshal to execute throughout his district all lawful precepts directed to him, and issued under the authority of the United States. In its usual form a *capias* is directed to the marshal of that district in which the court issuing it has jurisdiction to try the offense, and commands him to arrest the defendant if he shall be found in his district. By the provisions of the act of March 2, 1792, (1 St. at Large, 333) subpoenas in criminal cases for witnesses, in any district, may run into any other district. There is no similar provision in regard to other process in criminal cases, and this gives some ground to conclude that Congress

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having expressly declared that one kind of process might run throughout the United States, intended to exclude other process, not mentioned from having such operation. This point, however is believed never to have been judicially determined. Judge Lowell, in 1871, said he was not aware of any decision of a court or judge upon the question, but that the power of a judge to issue a warrant which would run throughout the United States had been much doubted. In Conklin's Treatise it is positively stated that a *capias* can only be executed within the district, and when issued by a district judge must be directed to the marshal of his district, the criminal jurisdiction of the judge being confined to his district. (Treatise, pp. 620, 643.) The attorney-general's office, the late Chief Justice Taney being then attorney-general, decided that a judge of the District of Columbia could lawfully issue a warrant for the arrest of a person, then in Virginia, for an offense committed in the District of Columbia. He said, however, that doubts from respectable authorities having been stated; he advised an application to the Chief Justice of the United States for a warrant which he thought would doubtless be obeyed without question. (2 Op. Attorney-General, p. 564.) The same view was taken by the office in 1864, but in this last opinion it is also stated that "there is another procedure which may be resorted to" and reference is made to section 33 of the Judiciary Act (11 Op., p. 127). Thus, while the procedure by simple warrant running throughout the United States has always been doubted and questioned when spoken of, that under the thirty-third section of the Judiciary Act seems never to have been doubted as proper as well in cases of arrest after indictment found as before. Certainly the proceeding by arrest and examination, in the district where the defendant is found before removal, is far more merciful than the other, for if the warrant of the district judge of Maine is authority for an arrest in California, a person may be arrested here and conveyed across the continent without an opportunity even to show that the marshal has mistaken his identity.

The defendant has admitted that the copy of the indictment is duly authenticated, and has raised no question on

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its form or substance. He has, however, made the point, that it is not sufficient proof of probable cause to justify the commitment of the defendant. The cases cited above show that a certified copy of an indictment is always considered sufficient for that purpose if uncontradicted, and in this case no proof was offered by the defendant. Such is the evidence on which the Governor of a State acts when the extradition of a fugitive from justice is demanded under the act of Congress above cited. Section 1550 of the Criminal Code of California provides that a certified copy of an indictment may be received as evidence by the examining magistrate. So that if the language of section 33, that the arrest shall be agreeably to the mode of process against offenders in the State, means that all the proceedings, and not merely the process, shall be governed by the State law, this evidence may be received on an examination like the present, and, as has been shown, is sufficient, when uncontradicted, to justify commitment.

In my judgment, then, the defendant must be committed or bailed to answer for the offense charged, unless the fact that the district where the offense is triable is within the territory of Utah precludes his removal to that district.

The question for determination is, whether the provisions of the thirty-third section of the Judiciary Act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a State or some portion thereof? And the answer must be in the affirmative if the words "district in which the trial is to be had," in the third clause of that section, refer only to districts established or organized under that act. The act of 1789 divided the United States into thirteen districts. Since that time, as States have been admitted new districts have been organized, and so far as I can ascertain it has never been questioned that the general provisions of the Judiciary Act applied to the new districts without any express enactment of them for such districts; although by a narrow construction of the language it might be held to apply only to those courts and districts organized, and to which cognizance of crimes is

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given, by that act. The provision is that if the commitment of an offender is in a district other than that in which the offense is to be tried, the judge shall issue his warrant for the removal of the offender to the district in which the trial is to be had. If, then, an offense against the United States may be tried in a district of Utah Territory, there is nothing in the language of this provision necessarily forbidding a construction which will justify the removal of an offender there for trial. The organic act of Utah does extend the Constitution and laws of the United States over the territory so far as the same may be applicable. It also makes provision for the organization of three District Courts therein, and further provides "that each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District courts of the United States." Thus these courts have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the territory, must go unpunished, unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the Judiciary Act. No other provision of law for such a case can be found, and it does not seem probable that Congress has left it wholly unprovided for. For, if it is doubtful that the warrant of a district judge of the United States can be executed out of his district, it is certain that the warrant of a territorial judge cannot run out of his territory. In *Clinton v. Englebrecht*, 13 Wal. 434, the Supreme Court held that there were no "District Courts of the United States" in the sense of the Constitution, in the territory of Utah; that although jurisdiction was conferred upon them to try cases arising under the Constitution and laws of the United States, this jurisdiction was no part of the judicial power conferred by the Constitution on the general government; that these courts were the legislative courts of the territory, created in virtue of that clause of the Constitution which authorizes Congress to make all needful rules and regulations respecting

the territories of the United States. It seems to me to follow from this, that the warrant of a judge of a territorial court, can no more run throughout the United States than can that of the judge of a State court. The case of *Benner v. Porter*, 9 How. 244, makes this clearer, if possible. The court there say that Congress must not only ordain and establish inferior courts, but the judges must possess the constitutional tenure of office, before they can become invested with any portion of the judicial powers of the Union.

It is doubtless true that the provisions of the Judiciary Act are, for the most part, confined in their application to courts of the United States in the sense of the Constitution. In *Hornbuckle v. Toombs* (18 Wal., p. 648) it was held that the clause in the organic act of a Territory extending the laws of the United States over the Territory had the effect to import laws of a general character and universal application, but whether, when acting in the capacity of United States Circuit and District courts, invested with the same jurisdiction in all cases arising under the Constitution and laws of the United States, the Territorial courts were to be governed by any of the regulations affecting the Circuit and District courts of the United States, was a question stated but not decided. Now the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States, committed within the jurisdiction of any of its courts.

Another clause in the section ought to be noticed. The language is that the offender may be imprisoned or bailed for trial before such "court of the United States" as by law has cognizance of the offense. Is this intended as a limitation of the power to arrest and imprison for *any offense* given in the context? I think not. The plain intention is to provide for any and every offense against the United States. The crime charged in this case is such an offense and is triable before the District Court of the third judicial district of Utah. While the District Courts of Utah are neither State courts nor United States courts in the sense of the Constitution, they are still courts estab-

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lished and organized under the authority of the United States, sitting in a Territory belonging to the United States and exercising their jurisdiction conferred upon them by that government. The whole Territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all.

It appears to me that, although the District Courts of Utah are not courts of the United States as defined in *Clinton v. Englebrecht*, they are in another sense not improperly styled courts of the United States as being organized by that government under the authority to make needful regulations for the Territories. They are spoken of as such in acts of Congress and in opinions of the Supreme Court. Thus, in *Hunt v. Palao*, 4 How. 589, the territorial court of Florida is spoken of as a court of the United States in contradistinction to a State court, and in *Clinton v. Englebrecht* the court speak of these courts as acting, in cases arising under the Constitution and laws of the United States, "as Circuit and District Courts of the United States." So far, then, as these courts have exclusive jurisdiction over crimes committed against the United States they may, it seems to me, be held to be included in the term "courts of the United States" as used in the thirty-third section of the Judiciary Act. I cannot see that any sound rule of construction is violated by so doing. The act is remedial in its character, and I do not find any good ground for giving it so narrow and technical a construction as is contended for by the defendant, the practical effect of which must be to leave offenses committed in a Territory where they cannot be reached or punished if the offender succeeds in escaping to some State.

My conclusion is that the defendant must be committed, unless he give bail in the sum of \$3,000 to answer to the charge against him before the court to which the indictment was returned. If bail be not given, a warrant for his removal will be issued as the law directs.

Points decided.

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The defendant, having been committed, was subsequently brought before Sawyer, Circuit Judge, on *habeas corpus*. After hearing, he was remanded to the custody of the marshal.

MARCUS NEFF v. SYLVESTER PENNOYER.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 9, 1875.

1. **POWER OF A STATE OVER THE PROPERTY OF NON-RESIDENTS.**—A State has the power to subject the property of non-residents, within its territorial limits, to the satisfaction of the claims of her citizens against such non-residents by any mode of procedure which it may deem proper and convenient under the circumstances, and therefore may, for such purpose authorize a judgment to be given against such non-resident prior to seizure of such property, and with or without notice of the proceeding.
2. **PROOF OF SERVICE IN CASE OF PUBLICATION.**—The proof of service required by section 269 of the Oregon Code to be placed in the judgment-roll includes in the case of service by publication, the affidavit and order for publication as well as the affidavit of the printer to the fact of publication.
3. **JUDGMENT-ROLL NOT THE WHOLE RECORD.**—The judgment-roll required by said section 269 is not the exclusive record of the case, but only a collection of papers and entries selected from the record for convenience and economy and sufficient in the opinion of the legislature to show the judgment of the court and its jurisdiction to give it; but the record is a history of all the acts and proceedings in the action from its initiation to final judgment which includes all the papers filed in the case, and upon which the court acted in any step of the proceedings, and this record is of the same verity as the judgment-roll which is made up from it.
4. **EVIDENCE NECESSARY TO AUTHORIZE ORDER FOR PUBLICATION.**—In case of service by publication the record must show that there was evidence presented to the court or judge who made the order for publication by affidavit, sufficient to prove the ultimate facts which bring the case within sections 55 and 56 of the Oregon Code, allowing such service; and it is not enough that the affidavit repeats the mere language of the statute, it must contain facts and circumstances sufficient to prove these ultimate facts; but when a judgment is attacked collaterally it is sufficient if the evidence contained in the affidavits *tends* to prove such facts.
5. **EVIDENCE OF CAUSE OF ACTION.**—An averment in an affidavit for an order for publication, "that plaintiff has a just cause of action against defendant for a money demand on account," is a mere assertion of the

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fact of the existence of such cause of action—the opinion of the affiant to that effect, but is no evidence of it, and is therefore insufficient to authorize such order.

6. **A VERIFIED COMPLAINT AN AFFIDAVIT.**—A verified complaint as to the facts stated therein, is an affidavit, and when it appears from the record that such a complaint, containing evidence of a cause of action against the defendant, was on file at the time of allowing an order for publication, the court will presume that such complaint was used as evidence therefor.
7. **DILIGENCE TO ASCERTAIN THE PLACE OF RESIDENCE OF NON-RESIDENT DEFENDANT.**—Where an order allowing service of a summons by publication, under sections 55 and 56 of the Oregon Code omits to direct that a copy of the complaint and summons be mailed to the defendant, addressed to his place of residence, it must appear from the affidavit that the plaintiff had used reasonable diligence to ascertain such place of residence and that it is unknown to him.
8. **PROOF OF PUBLICATION OF THE SUMMONS.**—Section 69 of the Oregon Code, having provided that in case of publication of the summons “the proof of service” shall be by “the affidavit of the printer or his foreman or his principal clerk,” an affidavit to such a publication by one styling himself therein “editor,” is not within the statute and therefore no evidence of the facts contained in it.
9. **AVERMENT OF SERVICE IN JUDGMENT ENTRY.**—An averment of due publication of a summons in a judgment entry which appears from the whole record to be untrue or is not affirmatively supported by the facts contained in such record, is a nullity and may be disregarded.
10. **PRESUMPTIONS IN FAVOR OF JURISDICTION.**—The common law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record or general jurisdiction had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action, but no such presumption does or ought to apply in cases where the defendant is a non-resident and there was no appearance and only constructive service of the summons by publication.

Before DEADY, District Judge.

The facts appear sufficiently in the opinion of the court.

John W. Whalley, M. W. Fechheimer and W. W. Page, for plaintiff.

H. Y. Thompson and George H. Durham, for defendant.

DEADY, J. This action is brought to recover the possession of a half section of land situate in Multnomah county, the same being donation claim 57. It is alleged in the com-

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plaint that the plaintiff is a citizen of California, and the owner, and entitled to the possession of the premises which are worth \$15,000; and that the defendant is a citizen of Oregon and wrongfully withholds the possession of the premises from the plaintiff.

The answer of the defendant tacitly admits the citizenship of the parties and the value of the premises as alleged in the complaint, but denies the ownership of the plaintiff and his right to the possession of the premises, and sets up a title thereto in himself. The defense of title in the defendant is controverted by the reply. By consent of parties the cause was tried by the court without the intervention of a jury, on September 24 and 25, 1874, and afterwards submitted on briefs.

On the trial the plaintiff proved that a patent to the premises was issued to him by the United States on March 19, 1866, as a settler under the donation act of September 27, 1850, and rested his case.

Thereupon the defendant offered in evidence duly certified copies of the complaint, summons, order for publication of summons, affidavit of service by publication, and judgment in the action of *J. H. Mitchell v. Marcus Neff*, in the Circuit Court of the county of Multnomah, wherein judgment was given against the defendant therein on February 19, 1866, for the sum of \$294.98; to the introduction of which papers the plaintiff objected, because, 1. Said judgment is *in personam*, and appears to have been given without the appearance of the defendant in the action, or personal service of the summons upon him, and while he was a non-resident of the State, and is therefore void. 2. Said judgment is not *in rem*, and therefore constitutes no basis of title in the defendant. 3. Said copies of complaint, etc., do not show jurisdiction to give the judgment alleged, either *in rem* or *personam*; and, 4. It appears from said papers that no proof of service, by publication, was ever made, the affidavit thereof being made by the "editor" of the *Pacific Christian Advocate*, and not by "the printer or his foreman, or his principal clerk." The court admitted the evidence, subject to the objections.

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The defendant then offered in evidence a certified copy of an execution issued upon said judgment on July 9, 1866, and the returns thereon from which it appears that the premises in question were sold upon said execution to satisfy said judgment on August 7, 1866, to J. H. Mitchell for the sum of \$341.60, to the introduction of which papers the plaintiff objected, because the judgment in *Mitchell v. Neff* being given without jurisdiction, the execution was void, and, further, that the notice of sale upon said execution and attached to the return, was no part of either, and therefore should not be admitted. The court admitted the evidence, subject to the objections.

The defendant then offered in evidence three papers purporting to be deeds to the premises to the defendant, the first being signed by Jacob Stitzel, sheriff of Multnomah county, by his deputy, C. B. Upton, on January 14, 1867; the second by said Stitzel, ex-sheriff of said county, on July 24, 1874, and the third by E. J. Jeffery, sheriff of said county, on July 21, 1874. To the introduction of which papers the plaintiff objected, because as to the first one: 1. It was not made to the purchaser at the sheriff's sale. 2. It is not sealed, witnessed or properly acknowledged as a deed. To the second one: 1. There being no valid judgment proved, the instrument is not a link in the chain of title. 2. It was not made to the purchaser at the sheriff's sale; and as to the third one, for the same reasons as in the case of the second one, with the additional one: That it was not executed by the officer making the sale. The court admitted the evidence, subject to the objection.

The defendant then offered in evidence an assignment by J. H. Mitchell to the defendant of the certificate of purchase of the premises, dated August 10, 1866, to the introduction of which the plaintiff objected, because: 1. There being no valid judgment, assignment is not evidence of title in the defendant. 2. If there were a valid judgment to support the sale to Mitchell, the assignment would pass a mere equity to the defendant, to enforce a conveyance from the former after he had received one from the sheriff, and

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therefore it is not evidence of title in the defendant. The court admitted the evidence, subject to the objections.

The defendant having rested, the plaintiff offered in evidence a duly certified copy of the judgment-roll in *Mitchell v. Neff*, which contained not only the complaint, summons, and other parts of the record of that case already introduced by the defendant, but also a copy of the affidavit of the plaintiff therein, upon which the order for publication was made; to the introduction of which the defendant objected because said affidavit was not properly a part of the judgment-roll. The court admitted the evidence subject to the objections.

Upon this evidence, the right of the plaintiff to recover is admitted, unless by virtue of the sale of the premises upon the judgment in *Mitchell v. Neff*, and the subsequent assignments of the certificate of purchase and the conveyances to the defendant, the legal title passed from the plaintiff to him.

Admitting that the proceedings in *Mitchell v. Neff* were duly taken according to the statute of the State in the case of non-resident debtors, what was the effect or force of the judgment as against the person of the defendant or his property? It is admitted on all hands that such a judgment is not binding *in personam*. (Story's Con. of Laws, sec. 539; *D'Arcy v. Ketchum*, 11 How. 174; *Galpin v. Page*, 18 Wall. 367.) And this rule is expressly declared in the Or. Code of Civil Procedure, section 506, as follows: "No natural person is subject to the jurisdiction of a court of this State, unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached." Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff.

But the plaintiff maintains that the court, in *Mitchell v. Neff* could not acquire jurisdiction to reach the property of a non-resident, or subject it to the payment of his debts, owed in this State, except by the actual seizure of such

property contemporaneous with the commencement of the proceeding or before the rendition of the judgment therein.

In support of this position, the case of *Galpin v. Page*, decided by Mr. Justice Field, in the Circuit Court for the District of California, on August 31, 1874, is cited (ante, 93). In this case the learned judge, after showing that "The tribunals of one State have no jurisdiction, and can have none, over persons and property without its territorial limits," proceeds as follows: "But over property and persons within those limits the authority of the State is supreme, except as restrained by the Federal Constitution. When, therefore, property thus situated is held by parties resident without the State, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the State over the property would be defeated if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the States, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. * * * A pure personal judgment, not used as a means of reaching property at the time in the State, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the State, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the State as to the liability of a party over whose person and property they have no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the State is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal *status* of the plaintiff in the State."

But I see nothing in this language or the rule as there

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laid down, which supports or gives countenance to the position of the plaintiff, unless it be in the statement that the statute giving the right to proceed by publication against non-residents of the State is valid only when restricted "to cases where, in connection with the process against the person, property in the State is brought under the control of the court, and subjected to its judgment."

Now, the property was "brought under the control of the court, and subjected to its judgment" in *Mitchell v. Neff*, if at all, by the execution which issued upon the judgment. This process against the property of Neff was issued to enforce the judgment given in pursuance of the process against his person. The one was the inception and the other the completion of the proceeding, and so they were connected together as the links in a chain. Certainly, the process against the property could issue in connection with the process against the person without being exactly simultaneous with it. They were related parts of the same proceeding.

Besides, this judgment, though personal in form, was procured, intended and used simply as a means of reaching the property of Neff then within the State, and according to the rule in *Galpin v. Page, supra*, is so far valid and binding. But the power of the State over the property within its limits, of non-residents, being supreme, and it being admitted on all hands that the State may subject such property "to such disposition by their tribunals as may be necessary to protect the rights of its own citizens," in my judgment, the mode of exercising this power is a matter for the State to determine. In the exercise of this power it may require that the proceedings be strictly *in rem* and commenced by the seizure of the property, or it may, as provided in this State, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so as to satisfy the same. In either case, the result is the same; while the latter mode of proceeding has this to commend it over the former, that it does

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not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established.

Nor does it appear to me that the State is bound in any case to provide for giving notice to the absent party by publication of the summons or otherwise. That matter pertains to the *mode* of proceeding over which the State has absolute control. The notice usually given is merely constructive, and in a large number, if not in a majority of cases, gives no information to the absent party. Of course it is the duty of the State to deal justly and considerately with non-residents who have property within her jurisdiction, and therefore it should provide as far as practicable that no proceeding should be taken in her courts to affect such property, without notice to the owner. It being shown that the State has the power to subject the property of non-residents to the payment of debts owing to her citizens by such a proceeding as may by law be provided, including one in which such property is not seized prior to judgment, but thereafter, and then only for the purpose of satisfying said judgment, it remains to be considered whether the judgment in *Mitchell v. Neff* was given by a court having jurisdiction to do so according to the laws of the State.

The plaintiff maintains that the court acted without jurisdiction, because it appears from the record: 1. That the order of publication was made without evidence that Mitchell had "a cause of action against" Neff; or, 2. That any diligence had been used to ascertain his "place of residence." 3. That the service of the summons was not proved as by statute provided.

In consideration of these objections two preliminary questions arise which must first be disposed of, namely: What constitutes a judgment-roll, and is it the only part of the record of the court which may be inspected upon an objection to its jurisdiction? As to what constitutes a judgment-roll in this State there has been no decision by the Supreme Court of the State, and therefore this court must construe the statute on the subject for itself. The Code

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of Civil Procedure, section 269, provides that “the clerk shall prepare and file in his office the judgment-roll,” “if the complaint has not been answered by any defendant” by attaching “together in the order of their filing, issuing and entry, the complaint, summons and proof of service, and a copy of the entry of judgment.” The law of this State at the date of the proceedings in *Mitchell v. Neff*, provided that whenever personal service cannot be made upon the defendant, and “after due diligence he cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and in like manner it appears that a cause of action exists against the defendant,” “such court or judge may grant an order” allowing constructive service to be made in the case, by publication of the summons, “among other cases, when the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action.” (Code of Civil Procedure, section 55.)

In the case of *Mitchell v. Neff*, there was an order granted by the judge allowing service of the summons to be made by publication, under this section. What then constitutes the proof of such constructive service, and is, therefore, a necessary part of the judgment-roll? The question is not altogether free from difficulty, principally because section 69 of the Code, in prescribing what “proof of the service of the summons” shall be, provides, that if served by the sheriff, his certificate thereof; if served by any other person, his affidavit thereof, and “in case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same.”

On behalf of the defendant it is maintained that section 69 limits the effect and scope of the phrase “proof of service,” as used in section 269, to the affidavit of the printer touching the mere fact of publication of the summons in the newspaper. But because the effect of the phrase is so limited in section 69—the printer’s relation to and knowledge of the subject beginning and ending with the fact of such publication—it does not follow that the legislature intended it should be so understood and applied when used

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elsewhere in the Code, particularly when the natural signification of the words and the plain import of the context, as in section 269, require that it should be construed to include other facts than this one.

The judgment-roll of the Code is a mere collection of papers and copies of entries in the case, sufficient, at least, to show a *prima facie* case of jurisdiction in the court and the exercise thereof until a final determination of the controversy, so far as the particular proceeding is concerned. As its name implies, it is the roll or record of the final determination or judgment, and not of the entire proceedings in the case. Among other things, the proof of service is directed to be placed in such roll, because, without it, it would not appear therefrom that the court had jurisdiction to give the judgment. But how does the mere affidavit of the printer, as to the publication of the summons, show a service of the summons? It cannot appear from such affidavit that any court or judge ever ordered publication of the summons, or, if so, in that particular paper or for that length of time. Such an affidavit may be made and filed in a cause and placed in the roll without any order for publication having been made, or, if there was one, without the publication proved by it being in any essential in accordance with it.

“The proof of service” in a judgment-roll, must, according to the natural signification of the words, and the obvious purpose of section 269, include not only the fact of delivery or publication of the summons, but the authority to do so. In the case of service by a sheriff, his certificate of delivery to the defendant would not be sufficient proof of service, unless it contained evidence of his authority—that is, was done in his official character; and so when the service purports to be by publication, it is not proven—shown, established—until the authority to publish is proven as well as the publication itself.

This proof—proof of service of the summons—the Code directs to be placed in the judgment-roll as part of it. What constitutes such proof depends upon the circumstances of the case. Where the service is by publication,

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it must include not only proof of the fact of publication in a newspaper, but the authority therefor. Nothing short of the order of the court allowing the publication will suffice for this purpose; and unless such order state that the facts necessary to give jurisdiction appeared by affidavit, it should include the affidavit also. Admitting that an order for publication containing the statements suggested would be *prima facie* sufficient, yet the full and complete proof of the service should include the affidavit upon which the order was made.

The only authority cited, which differs from this conclusion, is *Hahn v. Kelly*, 34 Cal. 304, in which it was held that neither the affidavit for the order for publication nor the order itself were a part of the judgment-roll, and that the only proof of service of the summons which it need contain is the affidavit of the printer to the fact of publication. The court admitted that "the proof of service by publication" should include the affidavit and order of publication, because "in point of law they constitute a part of the mode" of such service; and this itself is sufficient reason why the statute should not have been so construed as to exclude them. In the same court the previous cases of *Braly v. Seaman*, 30 Cal. 610, and *Forbes v. Hyde*, 31 Cal. 342, were considered and decided upon the theory that the affidavit and order for publication were a necessary part of the proof of the service and therefore a constituent of the judgment-roll. "Counsel eminent for learning and ability," who argued these important cases, "assumed and therefore conceded that they were a part of the judgment-roll;" and there can be no doubt that the rule first announced in *Hahn v. Kelly* was a wide departure from what had been understood and assumed by the bench and bar of that State to be the true construction of this statute.

In *Galpin v. Page*, *supra* 21, Mr. Justice Field held that the proof of service must include the affidavit and order for publication. In considering the question he says: "Now it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons mak-

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ing the service or publication, of which the sections immediately preceding in the same title speak; as if the language were as follows: 'Proof of the service of a summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows.' The obvious meaning intended is, that the proof of service which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit can be used to establish conclusively, a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must therefore be connected with the affidavit, or the proof will amount to nothing. The affidavit, by itself, is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

"When therefore the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in *Hahn v. Kelly*. That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the court, for it says: 'In our judgment, it would have added to the completeness of the record to have made proof of

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service by publication, include also the affidavit of the party, and the order of the court directing the publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it.'

"For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear, that properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll."

I am not advised what has been the practice in this State in this matter. In the case under consideration the roll does not contain the order for publication, but does contain the affidavit therefor. But the order having been put in evidence by the defendant may be considered, so far as he is concerned, a part of the roll. The roll itself is otherwise made up in utter disregard of the statute, the papers and entries comprising it, being attached together pell mell, without any reference to the order of their issuing, filing or entry;" while some of them are motions for orders and judgments and the like, which are out of place.

The ruling in *Galpin v. Page, supra*, being made by a justice of the Supreme Court of the United States, is of more direct authority in this court, than that in the *Hahn v. Kelly*, while the reasons for it, to my mind, far outweigh those given in support of the ruling in the latter case. In my judgment there is scarcely a doubt that the judgment-roll, to show "the proof of service," must contain not only the proof of publication of the summons, but also the authority for such publication. But the affidavit and order for publication may be inspected by this court for the purpose of ascertaining whether the court in *Mitchell v. Neff* had jurisdiction or not, upon another ground. The judgment-roll is not the whole of the record in *Mitchell v. Neff*. The record of the case comprise "a history of all the acts and proceedings in the action from its initiation to final judgment." (*Galpin v. Page, supra*, 22.) A part of this record or history is at least all the papers filed in the case, and upon which the court

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appears to have acted in any step of the proceedings. So are the entries and files containing the acts and doings of the court in the case. And these are all verities in the same sense, and in the same degree, as the portion of them which by statute constitute the judgment-roll. These are all elements of "the record at common law, which imported absolute verity," and the definition of a record contained in section 719 of the Code of Civil Procedure, is to the same effect: "A judicial record, is the record, official entry or files of the proceedings in a court of justice, or the official acts of a judicial officer, in an action, suit or proceeding."

There is nothing in section 269 prescribing how the judgment-roll shall be made up, which expressly or by implication makes it the record of the case or that imparts to it any more or greater verity, than the rest of the record. As has been already remarked, the judgment-roll is not the whole record of the case, but only a collection of such of the papers and entries as in the opinion of the legislature were necessary or sufficient to show a *prima facie* case of jurisdiction in the court to pronounce the judgment. The remaining portion of the record which is often voluminous, is omitted from this roll on grounds of convenience and economy. For the same reason, I suppose, the roll is made up in part by attaching the original papers together instead of copying them upon parchment, as was once the case, or in a book, as is still the case in some States, and in this in particular cases. (See section 270, Code of Civil Procedure.) There is really no ground for assuming that the legislature, in providing for this brief judgment-roll, intended to thereby exclude the rest of the papers and entries of the case from the record, and to take from them the force and effect as evidence to which they were otherwise entitled. In the very nature of things, there is just as much reason and convenience in attributing absolute verity to an order for the publication of a summons as to the *ex parte* judgment given in pursuance of it, in the same case and by the same court or judge; and it is not to be assumed, in the absence of express provision to that effect, that the legislature would make such an illogical and absurd distinction.

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In considering, then, the objections made to the judgment in *Mitchell v. Neff*, the court will inspect the affidavit and order for publication, as well as the rest of the record, upon the double ground that they are properly a part of the judgment-roll, and also a part of the general record of the case, and therefore, in either case, of equal verity with any part of such roll. If, then, it shall appear from the record in the case that the court in *Mitchell v. Neff*, never acquired jurisdiction to give the judgment it did, the sale of the premises and subsequent proceedings were void, and the plaintiff must recover. This conclusion would follow upon general principles, and is within the rule expressly declared in section 731 of the Code of Civil Procedure, as follows: "Any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction in the court or judicial officer * * * in respect to the proceedings."

To proceed, then, with the consideration of the objections: Was the order for publication of the summons made without evidence that Mitchell had "a cause of action" against Neff?

The affidavit of Mitchell upon which this order was made is dated November 13, 1865, and after the title of the cause reads as follows: "I, J. H. Mitchell, plaintiff, being first duly sworn, say the defendant, Marcus Neff, is a non-resident of this State; that he resides somewhere in the State of California, at what place affiant knows not, and he cannot be found in this State. The plaintiff has a just cause of action against defendant for a money demand on account. That this court has jurisdiction of such action. That the defendant has property in this county and State."

The order was granted in open court, on the same date as the affidavit, and reads as follows: "Now at this day comes the plaintiff in his proper person and by his attorneys Mitchell and Dolph, and files affidavit of plaintiff and motion for an order of publication of summons as follows:—'Now comes the plaintiff by his attorneys and upon the affidavit of plaintiff herewith filed moves the court for an order of publication of summons against defendant, as re-

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quired by law—he being a non-resident;’—and it appearing to the satisfaction of the court that the defendant cannot after due diligence be found in this State and that he is a non-resident thereof; that his place of residence is unknown to plaintiff, and cannot with reasonable diligence be ascertained by him; and that plaintiff has a cause of action against the defendant; and that defendant has property in this county and State, it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the Pacific Christian Advocate, a weekly newspaper published in Multnomah county, Oregon, and this action is continued for such service.”

The judgment in *Mitchell v. Neff* being now attacked or questioned collaterally, not on appeal, if there is any evidence in the affidavit tending to prove or establish the ultimate fact upon which jurisdiction to grant the order depends—the existence of a cause of action against the defendant—it is sufficient to sustain the judgment. But if there is no evidence of such fact, the court acted without authority and the judgment is void. I find the rule upon this subject laid down very fully and clearly by Mr. Justice Sawyer, in *Forbes v. Hyde*, 31 Cal. 348, as follows: “There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would in such case be reversed on appeal. But as there was jurisdiction to act, until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment

could not be collaterally attacked. If, however, there is a total want of evidence on any point necessary to be determined, upon which the law requires the mind of the judge to be satisfied as a prerequisite for granting an order of publication, then there is nothing upon which he is authorized to act; the evidence which is the very basis of his jurisdiction and upon which it depends, is wanting, and his action is without authority. His action is not merely erroneous, for there was nothing to call into exercise the judicial mind—there is no jurisdiction to act at all, and the proceeding is void.”

There is nothing in the affidavit of Mitchell which tends to show that he had “a cause of action” against Neff. True, he asserts therein that he has a cause of action, but this is not the statement of a fact tending to prove such a proposition, but a general assertion or expression of opinion that the proposition is true. But it is the province of the court to determine that question, upon the facts to be stated in the affidavit. A general statement that the plaintiff has a cause of action against the defendant is not sufficient. It does not make the matter appear to the court. The facts necessary to show that a cause of action exists must be stated. Concerning the material circumstances of time, place and amount, this affidavit is wholly silent, and whether this supposed cause of action arose upon an indebtedness of one mill for “a small measure of moonshine” or a million of dollars for as many miles of land, is left to conjecture. In *Forbes v. Hyde*, *supra*, 354, Mr. Justice Sawyer quotes, with approval, the following ruling upon this subject from *Ricketson v. Richardson*, 26 Cal. 153: “An affidavit which merely repeats the language or substance of the statute is insufficient. * * The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of

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action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered.”

Of course, in stating that the affidavit contains no evidence of the existence of a cause of action against Neff, I consider the sense of the language of that instrument: “Plaintiff has a just cause of action against defendant *for a money demand on account*”—as in no degree affected by the words which I have italicised. The expression—“a money demand on account”—is, so far as my knowledge goes, *sui generis* in the literature of the law. What it means is not obvious, and counsel have not been able to enlighten the court upon the subject. If it means anything, it is an allegation that the affiant has a demand against the defendant “for money on account,” which at least is a mere obscure amplification of what was already said in the averment that he had a cause of action against him.

So far, then, as the affidavit is concerned, it containing no evidence that the plaintiff had a cause of action against the defendant, the court acted without authority in making the order for publication and the same together with the judgment following it, is simply void.

But it is suggested that it appears from the verified complaint on file in *Mitchell v. Neff*, when this order for publication was allowed, that a cause of action existed in favor of Mitchell and against Neff. The complaint states, that the plaintiff is an attorney, “and as such, has been practicing in Portland, Oregon, for over five years last past. That between January 1, 1862, and May 15, 1863, plaintiff, at defendant's special instance and request, rendered profes-

sional services for defendant, as such attorney, which services were reasonably worth the sum of \$209 in legal tender notes; that said amount is long since due and unpaid, except \$6.50 paid thereon by defendant, January 24, 1863, wherefore," etc.

While it is questionable whether even the complaint states facts sufficient to prove the existence of a cause of action, and therefore to justify the granting of an order for publication, if the question arose upon an appeal, it doubtless contains some evidence tending to establish that conclusion, and, therefore, is sufficient, when the question arises, as in this case, where the judgment is attacked collaterally.

In *Forbes v. Hyde*, *supra*, 355, the complaint which was not necessarily verified, was not in the record. The court was asked to presume that it was verified, and contained evidence tending to show the existence of a cause of action, and that the court in allowing the order for publication may have acted upon it as well as the insufficient affidavit. But it declined to do so, saying: That "it affirmatively appears by the recitals in the order itself that the order was based upon the affidavits of Green and Brooks."

In *Mitchell v. Neff* the complaint is in the record, and appears to be verified. It is therefore, as to the facts contained in it and relative to this inquiry, substantially an affidavit. The motion for the order for publication, which is recited therein, asks that it be made "upon the affidavit of plaintiff herewith filed," but the order itself does not state that was made exclusively upon the affidavit. It states: That "it appearing to the satisfaction of the court," etc., without stating how or why. In a case like this there is no presumption that there was any evidence before the court allowing the order other than appears by the record. But it appears from such record that the complaint was on file in the case when the order for publication was allowed, and was therefore before the court, and might have been used by it in allowing the order as evidence that a cause of action existed against Neff. In *U. S. v. Walsh*, 1 Dedy, 282, I held that the complaint in an action for a penalty was an

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affidavit, and sufficient for the allowance of a writ of arrest under section 107 of the Code of Civil Procedure. The point is not free from doubt, but my mind inclines to the conclusion that this court ought to presume, if necessary, that the court in *Mitchell v. Neff* acted upon the evidence contained in the complaint, as well as the affidavit in allowing the order, and therefore I conclude, that so far as this objection is concerned, the judgment is valid.

The second objection to the judgment is, that it does not appear from the record that any diligence was used by Mitchell to ascertain Neff's place of residence. The fact upon which the objection is based is admitted by counsel for defendant, but they insist that it is not necessary that the affidavit upon which the order of publication was allowed, should contain the evidence of such diligence; that the fact might be proved by oral testimony. The order merely states that it appears to the satisfaction of the court that the place of residence of Neff "is unknown to plaintiff, and cannot, with reasonable diligence, be ascertained by him." Upon what evidence this conclusion was reached by the court does not appear, except in the recital that the motion was made upon the affidavit of the plaintiff.

Sections 55 and 56 of the Code regulate the allowance of service of summons by publication, and ought to be taken and construed together. The latter provides that "In case of publication the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him."

The fact of diligence can only be shown by affidavit, and this must appear by the record. (*Cook v. Farrar*, 11 Abb. 40; 13 How. Pr. 43; *Hallet v. Richters*, 16 Id. 43; *Titus v. Relyea*, Id. 373; *Hyatt v. Wagenright*, 18 Id. 248.

The exposition of section 798 of the Code of Civil Procedure, by defendant's counsel to show that an affidavit could not have been used to prove "diligence" upon the application for the order is unsound. On the contrary,

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such section expressly provides that an affidavit may be used on a motion. Indeed, I do not understand that the evidence of a witness can be heard on a motion otherwise than by affidavit. The application for the order for publication of the summons was a motion, and any evidence used in support of it should have been by affidavit, and doubtless such was the case. Besides, sections 55 and 56 taken together, by necessary implication, require that the proof of residence and diligence shall be by affidavit. In construing the corresponding sections in the California Code, the court in *Rickelson v. Richardson*, 26 Cal. 152, said:

“Sections 30 and 31 treat of the same general subject, and they must be read together for the purpose of ascertaining what the affidavit and order should contain in order to satisfy the law and make the service complete. It must appear from the affidavit that the person upon whom service is to be made either resides out of the State or has departed from the State * * *; and also whether his residence is known, and if known, it should be stated. * * The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known, the residence must be stated. It is true that this is not required in terms in the thirtieth section, which is more especially devoted to the affidavit; but, as we have already said, the whole statute on the subject of service by publication is to be read together, and section 31 requires that where the residence is known the order shall direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. In granting the order, the court or judge acts judicially and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge. That the fact of residence should appear in the affidavit is therefore necessarily implied from the whole tenor and scope of the statute. * * * * *

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Where this kind of service is sought the proceedings should be carefully scrutinized and strict compliance with every condition of the law exacted; otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the "enlightened judgment of a court or a judge."

The evidence of diligence used to ascertain the residence of the defendant, when it is alleged to be unknown to the party making the application, must appear in the affidavit for the same reason that "the fact of residence" should, if known to such party. The one is the equivalent of the other. Either the place of residence of the defendant must be shown, or it must appear that it is unknown to the party and what diligence he has used to ascertain it. They are in the same category, and the law which requires one to be shown by affidavit equally applies to the other. It was not intended that the law should be a means of *spoiling* non-residents, and therefore it provides that the defendant shall have personal notice of the proceeding if possible, so that he may take proper measures to protect his rights. The provision requiring a copy of the summons and complaint to be mailed to the address of the defendant is a wise and just one, and well calculated to prevent its abuse. Little chance has a non-resident to be informed of the proceedings against him by the mere publication of the summons, often, as in this case, in a weekly newspaper of denominational circulation within the State, and practically none without it.

The court having omitted to make the order directing a copy of the summons and complaint to be deposited in the post-office, addressed to the defendant at his place of residence, upon the mere allegation in the affidavit, that such place of residence was "somewhere in California," then unknown to the affiant, and without any evidence that the plaintiff had ever used any diligence to ascertain such place of residence, or even that he was not conveniently and intentionally ignorant of the fact, the order allowing service

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by publication, and the service and judgment following it are necessarily void and of no effect.

The third objection to the judgment is also well founded. There was no legal proof of the service of the summons by publication, and therefore the court had no jurisdiction to give the judgment. As has been stated, section 69 of the Code of Civil Procedure requires that the service of the summons shall be proved, in case of publication by the "affidavit of the printer or his foreman or his principal clerk." As appears from the affidavit to the publication it was made by Henry C. Benson, the "editor" of the paper. The statute is imperative and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. It may be in some cases that the editor has such knowledge also. So it may have been in *Mitchell v. Neff*, but if it were so it should have been stated. But as a rule the contrary is probably true. One of the elementary rules of evidence is that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts where the proceeding is *ex parte*. An editor does not know by virtue of his employment as such, that a summons has been published in all the numbers of the paper he edits, put in circulation during a certain period of time. But the printer may be reasonably presumed to. Therefore the editor's affidavit is not the best evidence of the matter. True he may inform himself concerning it, and so may any one having no relation whatever to the paper. But speaking from information derived at second-hand in this way, the witness is liable to be mistaken or imposed upon.

For these very sufficient reasons, as it appears to me, the legislature has required that the service by publication shall be proven by the best evidence of which the case is susceptible—the affidavit of the printer, his foreman or principal clerk. This being so, no court is authorized for

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any reason to assume that the affidavit of an editor or other person, not the printer of a paper, is legal evidence of a publication therein.

But counsel for defendant maintain that due service of the summons appears from the entry of judgment which states "that the defendant had notice of the pendency of the action by publication of the summons for six successive weeks in the Pacific Christian Advocate."

What is meant by the averment "that the defendant had notice of the pendency of the action" is not clear. The averment is without the statute which does not provide that the defendant shall have notice of the pendency of the action by publication, but that constructive service of the summons may be made upon him by that means. Whether he thereby acquires actual notice of the proceeding, the court cannot know and therefore cannot find. The averment should be that the defendant was duly served with the summons by publication of the same in the Advocate, etc. But assuming that this averment is formally sufficient, it does not appear to be true in point of fact. The record not only fails to support it, but actually contradicts it. So far as the record discloses the fact there was no evidence before the court that the defendant had any notice of the pendency of the action by a publication of the summons. The affidavit of the editor of the Advocate was not competent evidence of the fact, and none other appears to have been before the court.

And, finally, it is insisted by counsel for defendant that the court in *Mitchell v. Neff* was a court of general jurisdiction, and therefore the law presumes its proceedings were regular and within its power, unless the contrary affirmatively appears from the record.

Admitting for the moment that this rule applies in cases of this kind, it is a sufficient answer to say that the contrary does appear here from the record. If the record of a court is silent as to a jurisdictional fact for the purpose of upholding the judgment, it will be presumed that the fact was duly made to appear by the court; but when it appears from the record, that such fact was made to appear by a

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certain means, it will not be presumed that it was also made to appear otherwise or differently. Here the record shows that the proof of service was made by the affidavit of the editor, and there is no room to presume that it was otherwise or differently made. The record is not silent on the subject. It speaks for itself, and there is no reason or necessity for resorting to presumption. Moreover, in this class of cases, it is not sufficient that an averment of due service of the summons in the judgment-entry should be not in conflict with the facts contained in the record—it must be affirmatively supported by them. If such an averment could be successfully substituted for the proof of the fact which the statute requires, it is reasonable to suppose that the proof would generally be dispensed with. The averment is a nullity.

But I am satisfied, upon both reason and authority, that the rule in regard to presumptions in favor of the regularity of proceedings in courts of general jurisdiction, does not and ought not to apply in cases where there is no appearance or actual service of the summons, and the defendant is a non-resident of the State. This presumption is a rule of the common law. It had its origin and is only applicable to a procedure in which judgment could not be given against a defendant, unless he was not only personally summoned, but was arrested or appeared in the action. If he did not appear, his goods and the profits of his lands might be distrained *ad infinitum* to compel an appearance; or if he absconded, he might be outlawed, but no judgment could be given against him in the action until he appeared and was heard. (3 Black. Com., 280 *et seq.* See *v. Hess Cole*, 3 Zab. 116.)

The court being without jurisdiction to proceed in the action until both parties were before it, and each had an opportunity to allege what he might for himself and against his adversary, it might well be presumed that its judgment was regularly and duly given, unless the contrary affirmatively appeared by the record. Such is still the rule in regard to courts of general jurisdiction when proceeding substantially according to the course of the common law.

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But the proceeding in *Mitchell v. Neff*, so far as the acquiring of jurisdiction is concerned, was in fact and theory *ex parte*. The record was made by the plaintiff without the knowledge or interference of the defendant. He was not present to question the jurisdiction of the court, or point out wherein the facts stated or shown by the plaintiff were insufficient to authorize its action. The action of the court in the premises in such cases is only formal. Technically it gives the judgment, but substantially the proceeding and record are taken, conducted and made up by the plaintiff upon his own judgment. No presumption ought to be allowed in favor of the jurisdiction in such cases. Every fact necessary to sustain the jurisdiction, must appear from the record or the judgment is void. As was said by Mr. Justice Field, speaking for the court in *Galpin v. Page*, 18 Wall. 368: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

In *Galpin v. Page*, in the Circuit Court, *supra*, 7, it was held, citing the same case in 18 Wall., that "the presumptions which the law implies in support of the judgment of superior courts of general jurisdiction" were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law." And again at p. 12: "When the judgment of such a court" (of general jurisdiction in civil cases) "is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except

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on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court can only be exercised in a prescribed manner not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits, and did not appear to the action, no such presumption of jurisdiction can rise. The judgment, being as to its subject-matter or persons, out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several States, and in the Supreme Court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissentient voice."

But I do not understand that a mode of proceedings is "different from the course of the common law," in the sense in which that phrase is here used, because there may be a difference in mere non-essentials or incidents which change with the manners and circumstances of a people and their ideas of utility and convenience. As, for instance, whether a pleading is verified or not, or a denial is special or general, or a defendant shall answer without or after an imparlance, or an issue shall be made by the complaint and an-

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answer, or by an indefinite series of pleadings or altercations if necessary, or there shall be many forms of action or but one, or a judgment in ejectment shall be a bar to another action or not, does not in this sense make the mode of proceeding differ from the course of the common law. But as has been shown, the corner-stone of a proceeding at common law was that no judgment could be given against a defendant unless he appeared in the action. Out of this important fact grew the reasonable presumption that the record was absolutely true and the court had jurisdiction to give the judgment. But the law ceases with the reason of it. There is no reason for such a presumption when the proceeding takes place in the absence of the defendant upon a mere constructive service of process upon him. In such case the record must show affirmatively every fact necessary to give the court jurisdiction, and as to such facts it may be even contradicted, when attacked collaterally in the tribunal of another forum. (*Thompson v. Whitman*, 18 Wall., 468). This court and the one that gave the judgment in *Mitchell v. Neff* are tribunals of different sovereignties exercising a distinct and independent jurisdiction," though within the same territorial limits. The judgment of the State court is only entitled to the same faith and credit in this court as it is in the courts of another State. (*Galpin v. Page, supra*, 10.)

I cannot better conclude this opinion than by quoting and adopting the language of Mr. Justice Sawyer in a similar case (*Forbes v. Hyde, supra*, 355): "We are not insensible to the fact that this decision may affect many judgments obtained upon service by publication of summons in years past, and for that reason we have bestowed upon the question the attention which its great importance demands. We know that there is probably no State in which there have been, and where there is likely to be, so many occasions for procuring service by publication as in California. But while this is true, it is doubtless equally true, that there is no State in which so many have waited and are still waiting for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice. It may be important to the interests of those

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who suppose they have acquired rights under this class of judgments that they should be upheld. But it is equally important that the interests of parties, who have been only constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy when a party has no notice, for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in *Smith v. Rice* (12 Mass., 512) 'the very grievance complained of is that the party had no notice of the pending of the cause and of course no opportunity to appeal.'

There must be judgment for the plaintiff and findings of fact and law will be prepared in accordance with this opinion.

THE UNITED STATES v. JOHN A. CARR.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 23, 1875.

1. CUSTOMS—ALASKA.—Section 12 of the act of March 3, 1825, (4 Stat. 118,) defining the crime of extortion under color of office, so far as officers of the customs are concerned, is an act relating to customs, and was therefore extended over Alaska by section 1 of the act of July 27, 1868. (15 Stat. 240.)
2. ALASKA—CRIMES COMMITTED IN.—Alaska being a place without the limits of any State or judicial district of the United States, within the meaning of section 14 of the act of March 3, 1825, (4 Stat. 118, sec. 730 of the R. S.,) this court has jurisdiction to try a person charged with the commission of a crime therein; provided such person is found in the district of Oregon or first brought here.
3. SAME SUBJECT.—Section 5481 of the R. S. being passed June 22, 1874, after the cession of Alaska, is in force there from the time of its passage.

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Before DEADY, District Judge.

The facts appear in the opinion of the Court.

Rufus Mallory, for the United States.

Joseph N. Dolph, for the defendant.

DEADY, J. Two indictments (Nos. 420 and 444) have been found against the defendant, the collector of customs at Fort Wrangel, Alaska, charging him with the commission of the crime of extortion under color of office. The defendant demurs to the indictments.

In support of the demurrer, it is maintained: 1. That section 12 of the act of March 3, 1825 (4 Stat. 118), defining the crime of extortion under color of office was not extended over Alaska by section 1 of the act of July 27, 1868 (15 Stat. 240), which only included "the laws of the United States, relating to customs, commerce and navigation;" 2. That upon the cession of territory to the United States, as in the cession of Alaska, the laws of the United States are not extended over it *proprio vigore*; and, 3. That if the act of 1825, defining the crime of extortion, was extended over Alaska upon its acquisition by the United States, still this court has no jurisdiction to try the defendant for a violation thereof, because the jurisdiction of this court over offenses committed in Alaska is conferred by the act of 1868 aforesaid, which only gives such jurisdiction for violation of that act and the laws relating to customs, commerce and navigation.

To this it is replied by the prosecution: 1. That the act of 1825 defining extortion, so far as the defendant, a deputy collector of customs, is concerned, is an act relating to customs—a revenue law—and therefore in force in Alaska by means of the act of 1868 aforesaid. 2. That said law being a general one for the punishment of extortion by any officer of the United States, was in force in Alaska *proprio vigore* from the time of its cession to the United States. 3. That by section 5481 of the revised statutes of the United States, passed June 22, 1874, the crime of extortion by an officer of

the United States is defined, and that said act being passed since the cession of Alaska is in force there from the time of its passage, which was prior to the commission of the crime charged in the indictment No. 444. 4. That although this Court would not have jurisdiction of these offenses for the sole reason that they were committed in Alaska, unless the act defining the crime of extortion was *pro tanto* an act relating to customs, and therefore extended over Alaska by the said act of 1868; yet under section 14 of said act of 1825 (Sec. 730 of the R. S.), if the law punishing extortion was otherwise in force in Alaska, this court would have jurisdiction to try the defendant upon the charges, if it appears that this is the district in which he was found or first brought, because Alaska, the place where the alleged crimes were committed, is without the limits of any State or district of the United States.

The demurrers must be overruled. The act defining the crime of extortion, and providing for its punishment, includes officers of the customs, and so far it is an act "relating to customs," and is, therefore, in force in Alaska by virtue of section 1 of the act of July 27, 1868, extending "the laws of the United States relating to customs, commerce, and navigation" over that country, if not *proprio vigore*.

Besides section 12 of the act of 1825, defining extortion, having been re-enacted on June 22, 1874, as section 5481 of the R. S.—after the cession of Alaska to the United States—was, therefore, in force in that country *proprio vigore* at the time the crime charged in No. 444 is alleged to have been committed. This being so, the facts stated constitute a crime, of which this court has jurisdiction, it also appearing that it was committed without the jurisdiction of any particular State or district" (Sec. of Act of 1825; Sec. 730 R. S.); and that the defendant was first brought into this district, independent of the jurisdiction specially conferred upon it by section 7 of the Alaska act of 1868 (Sec. 1957 R. S.)

The demurrers are overruled, but the defendant may be heard upon the same questions in arrest of judgment if a verdict should be given against him on the trial.*

*The defendant afterwards pleaded guilty and was fined.

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IN RE JOHN SIME & Co., BANKRUPTS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 23, 1875.

1. **CERTIFICATE OF DEPOSIT—BANKRUPTCY OF MAKER.**—After the bankruptcy of the maker his certificates of deposit are dishonored paper, and after they have been proved as claims against his estate no longer possess the qualities of negotiable paper.
2. **IDEM.**—Such claims are not entitled to the protection allowed by law to negotiable instruments, but stand on the same footing as a claim proved for an open account.
3. **PURCHASER FOR VALUE.**—A person who takes an assignment of a claim proved in bankruptcy, as security for an antecedent liability from him in whose name the claim is proved, and who is apparently, though not really, the owner thereof, is not a purchaser for value and cannot hold the claim against the true owner.

Before HILLYER, District Judge.

Petition of Sol. A. Sharp for an order restraining the trustee, P. J. White, from paying certain moneys in his hands to one Wm. T. Garratt, and directing the payment of said moneys to the petitioner.

The material facts are as follows: Sime & Co. were bankers, and on the first day of November, 1871, filed a petition and were adjudged bankrupts. At the time of the failure, Wm. R. Briggs was the holder of two certificates of deposit issued to him by Sime & Co. of the usual form payable to himself or his order on return of the certificate properly indorsed, one for \$4000 and the other for \$3500. At the same time the petitioner, Sharp, had a balance on an open deposit account to his credit of \$1413.92.

Prior to the said first of November, two suits had been commenced and were still pending, one against John N. Risdon, and the other against Risdon & Coffee, the plaintiff in each being one Smith, who sued as assignee of John Sime & Co. and for their use and benefit. In these suits the property of John N. Risdon had been attached and released upon an undertaking executed by William Ware and the respondent Garratt. Garratt had also paid out for Risdon \$3200 on a note. Before executing the undertaking Garratt obtained

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from Risdon a conveyance of certain real property on Bush street as security for the money paid, and against his liability on the undertaking.

In this state of affairs, an agreement was made between Briggs, Sharp and Risdon on the same day (November 1), whereby it was agreed between them that Sharp and Briggs should assign their claims against Sime & Co. to Risdon; that Risdon should execute notes for sixty per cent. of their amount, the notes to be indorsed by Ware; that the certificates of Briggs, and the account of Sharp, when indorsed and assigned, should be placed in the hands of R. H. Lloyd, and the notes in the hands of John R. Jarboe; and that in the event Risdon was able to use these claims as a setoff in the before-mentioned suits, then Lloyd was to deliver the certificates and account to Risdon, and Jarboe the notes to Briggs and Sharp. If the claims were not used as a setoff, then the notes were to be given up by Jarboe to Risdon, and the claims to Briggs and Sharp, by Lloyd. At the time of making the agreement it was supposed that Sime & Co. would go into bankruptcy, and it was uncertain whether the claims would be assigned before the filing of their petition so that they could be used as setoffs.

In pursuance of this agreement Sharp made a written assignment of his account to Risdon, and Briggs indorsed his certificates; the notes were executed and placed in the hands of Jarboe and the claims in the hands of Lloyd. Briggs' indorsement was as follows: "Without recourse, W. R. Briggs." The assignments from Briggs and Sharp to Risdon were made after the petition was filed.

On the ninth of December, 1871, Lloyd made out formal proofs of these claims in his hands, which were sworn to by Risdon. They were then left in the hands of register Bates, Mr. Lloyd stating to the register, that he was acting for other parties in the matter, and claimed a right to control the claims. Subsequently the claims got into the hands of the trustee White, and on the twelfth of September, 1872, into those of register Clarke. Prior to this no file mark appears on the claims. Attached to the proof is a copy of Sharp's account with the written assignment and

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the original certificates of Briggs indorsed in blank as aforesaid. So that on their face the claims appeared to be Risdon's. On each proof over the date of October 21, 1872, is a statement signed by the trustees to the effect that the claim is allowed, but that they think the assignment was made after the petition was filed, and that the claims cannot be used by Risdon as a setoff.

On November 21, 1872, Risdon, by an assignment filed with register Clarke, assigned both claims to the respondent, Wm. T. Garratt, as security, in addition to the real property before conveyed, for the liability on the undertaking and the money paid as aforesaid. No new or present consideration was paid by Garratt for the assignment. When the agreement was made it was supposed the Sime & Co.'s estate would pay about twenty-five cents on the dollar. Afterwards by an advance in stocks the estate became able to pay dollar for dollar. The suits against Risdon went to judgment without the claims being used as setoffs; ever since the trustee and his attorney have refused their assent to the allowance of them as a setoff in the bankruptcy matter.

Before the filing of the present petition Briggs assigned his interest in the claims to the petitioner, Sharp.

Sharp & Lloyd and Walter H. Tompkins, for petitioner.

M. M. Estee, for respondent.

HILLYER, J. Upon the facts it is plain that Risdon never has become, and he never can become, the true owner of these claims, under the agreement between him and Sharp and Briggs. Because he never did, and he never can, use them as a setoff to the demand of Sime & Co. against him. The construction sought to be put upon the agreement by counsel for Garratt, that it was the intention of the parties to transfer the absolute title to Risdon subject only to a right on his part to return the claims and receive the notes, if he could not use them as a setoff, is not the true one. This is evident from the fact that Sharp and Briggs, by the terms of the agreement never could become entitled to a delivery of

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the notes to them until the claims were used as setoffs. The agreement must all be construed together; and so taken, the use of the claims as a setoff was the thing upon which the right of Risdon to the claims, and of Sharp and Briggs to the notes, hinged.

So far, then, as the parties to the agreement are concerned the property in these claims never was in Risdon. His assignment of them, under the circumstances, was a fraudulent act, and the only question in this case upon which I have felt any hesitation is, whether Garratt got them under such circumstances as to debar the true owners from asserting their title against him.

But little need be said in answer to that portion of respondent's argument which went upon the assumption that the two certificates of deposit were negotiable instruments, and came into Garratt's hands as indorsee without notice of any of the facts impeaching Risdon's title. For, after the bankruptcy of the maker, they were dishonored paper, and, after they were proved and filed as claims in the bankruptcy court, they no longer had the qualities of negotiable paper. The claims, as such, were neither transferable by delivery nor indorsement; they could still be assigned but not delivered or taken from the files. It is surely a complete misnomer to call such claims negotiable paper. The claim, then, which embraces the certificates, stands on the same footing as the one proved for the open account. These claims must be treated as personal property, and as not entitled to the immunities and protection allowed by law to negotiable instruments.

The general rule of the common law is, that no one can give a better title to personal property than he has himself. (*Murray v. Lardner*, 2 Wall. 110.) It is said in *Root v. French*, 13 Wend. 510, that one exception to this rule which will give a third person a better title and a superior equity to the true owner, is made in favor of a third person who has given value for the property or incurred some responsibility upon the credit of it, and without notice of the fraud.

Garratt claims that he is a purchaser for value without notice of the fraud. Is he? It has been held that "a per-

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son who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it." (*Andrews v. Pond*, 13 Pet. 65.) And again: "A note overdue or a bill dishonored is a circumstance of suspicion to put those dealing for it afterwards on their guard, and in whose hands it is open to the same defenses that it was in the hands of the holder when it fell due. After maturity such paper cannot be negotiable in the due course of trade, although still assignable." (*Fowler v. Brantley*, 14 Pet. 318.) If this is true of notes and bills which pass by delivery, *a fortiori* it must be so of claims, like those in the present case, assigned after the bankruptcy of the maker and actually proved up and filed in the bankruptcy proceedings. Nor can the fact that the claims were proved up in the name of Risdon be regarded as any higher evidence of title in him than would his possession of the assigned account and the indorsed certificates had the claims not been proved and filed.

If it is *prima facie* evidence of title it is not conclusive against the true owner. Possession, says the Supreme Court of California, of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property, of which a transfer is attempted, with the exception stated. (*Wright v. Solomon*, 19 Cal. 64.) *Wetmore v. San Francisco*, 44 Cal. 294, cited by respondents, is not against this, because there the assignor of the demand against the city was the true owner of it, and assigned it absolutely. Here, Risdon was not the owner, and, under the general rule, could convey no better title than he had.

But is Garratt a purchaser for value? Whether in the

case of the transfer of a negotiable instrument as security for a pre-existing debt, the transferee is a holder for value so as to cut off equities between the antecedent parties, is a very unsettled question. The tendency of the Supreme Court of the United States seems to be towards holding that the transferee under such circumstances takes the paper clear of equities of which he had no notice. (*Swift v. Tyson*, 16 Pet. 1; and *Goodman v. Simonds*, 20 How. 343.) But this, if ever it is done, will be on account of the favor with which the commercial law regards negotiable paper from a desire to make its circulation as safe and untrammelled as possible. The same reason, however, does not apply to this case, and unless the respondent gave value, incurred some responsibility, parted with something, on the credit of the assignment, he can have no equity, superior or equal to that of the true owners.

But Garratt has parted with nothing on the faith or credit of Risdon's assignment, and will be in no respect worse off, if these claims are returned to the true owner, than he was before they were assigned to him. The assignment of the claims to Garratt as a security for pre-existing debts and liabilities does not constitute him a "purchaser for value" according to the legal import of that term, nor enable him to invoke the rule, that where one of two innocent parties must suffer, from the fraud of a third person, he shall suffer who by some act of his has put it in the power of the third person to commit the fraud. On the other hand, these claims represent so much coin deposited by Sharp and Briggs with Sime & Co., and hitherto they have received nothing for them. The notes in Jarboe's hands are not, and as we have seen, they cannot, under the agreement, become available to them. So that, if the respondent were to succeed, he would get some \$10,000, for which he had actually given nothing. Or Risdon himself would get it in case this additional security was not needed to make Garratt whole on the liabilities he has incurred for Risdon. Such a result is repugnant alike to law and equity. In addition to this, the testimony of Garratt leaves little doubt in my mind that he took the assignment with full knowledge of the true state

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of Bisdon's title. I rest the decision, however, upon the ground that Garratt is not a purchaser for value; and cannot, therefore, hold these claims against the true owner, whom I find to be the petitioner.

There must be a decree for the petitioner as prayed, with costs.

On appeal, SAWYER, Circuit Judge, affirmed the decree of the District Court.

GEORGE WHITE v. A. N. McDONOUGH.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 24, 1875.

1. **LIABILITY OF MASTER OF VESSEL.**—The master, as well as the owners of a vessel, is a common carrier, and is personally responsible for his own negligence and misfeasances.
2. **SOLDIER DISCHARGED AT SEA, STATUS OF.**—A soldier on board ship, for whose transportation the government had contracted was discharged at sea during the voyage: *Held*, That after his discharge the legal relation of passenger to master did not exist between him and the master, and that it was no breach of duty on the part of the master to allow the soldier to be subjected to military discipline as he was when the contract for carrying him was made and the voyage began.

Before HILLYER, District Judge.

This is a libel filed against the master of the steamship *Montana* to recover damages for an assault alleged to have been committed, in the presence of and with the express consent of the defendant, upon the libellant, by the commanding officer of troops on board the ship.

The libellant was a musician in the regular army, and as such was put on board the *Montana*, at the mouth of the Colorado river, for transportation, with a detachment of two hundred and thirteen officers and men. The transportation was paid for by the government.

While at sea the libellant's term of service expired, and he received an honorable discharge in due form.

After libellant had received his discharge, the colonel commanding the troops, or his adjutant, for some breach of

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military discipline, ordered him below to work in the coal hold, and the order was enforced, so far as to keep libellant below a short time. The next day he was ordered to be taken below again, and before going White went to the master of the ship with his discharge, which the master read. White demanded protection of him, claiming to be a citizen and passenger.

The master went to the colonel commanding the troops and stated White's complaint to him. The colonel replied by reading the sixtieth Article of War, and claiming that White was still serving with the army under that article, and told the master he had better not interfere. The master then told White he could do nothing for him, and White went below again, where he stayed about three minutes. He was kept under guard all of one day. It is not claimed that White was treated with any undue rigor or severity, if he was subject to military discipline, and it is admitted that the same acts done without authority to a passenger, in the ordinary sense of that word, would be gross ill treatment and wholly unjustifiable.

G. W. Tyler, for libellant.

W. W. Crane, for defendant.

HILLYER, J. The first point argued by the defendant, with much seeming confidence, is that White cannot maintain this action against the master of the ship. If White, it is said, was a passenger, and the passenger contract was violated, his remedy is against the owner. The master being merely the agent of the owners, his omission to perform a duty which the owners may have owed to the passenger, under their contract as common carriers, does not give the passenger any right of action against the master.

No authorities were cited in support of this position; and I do not think the law will sustain it.

Both the owners and the master are regarded as common carriers. For his own negligences and misfeasances, the master is liable, and there appears to be no distinction in principle between this case and many which are found in

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the books against the masters, such as for injuries to property arising from his negligence or unskillfulness, permitting one of his subordinate officers to maltreat a seaman, for indecent behavior to a female passenger, and the like.

The master has duties and obligations of his own for a breach of which he is personally responsible. Among his duties is that of interposing his authority to protect both passenger and seaman from maltreatment while on board his ship. He is armed, says the judge of this court, with absolute authority and corresponding responsibilities. He has such authority—and a like duty—to protect the crew from the brutality of officers. What he permits he is justly considered to commit; and he permits that which he does not by a prompt exercise of his authority, prevent." (*Anderson v. Ross*, 2 Sawyer, 91.) In respect to passengers the master owes a still higher and more delicate duty. (*Chamberlain et al. v. Chandler*, 3 Mason, 242.)

The libel in this case states a good ground of action against the master, and if the proofs support it, the libellant ought to have a decree for damages.

It is urged that White was not a passenger in the proper sense of that word; that soldiers on board are not passengers, and that White after his discharge continued under the military jurisdiction of the officers commanding the detachment of soldiers.

The truth is, that White was neither passenger nor soldier at the time the alleged wrongs were done to him. He had made no contract for his carriage on the ship; that was with the government. The legal relation of master to passenger did not exist; nor was White a soldier after his discharge; nor did he come within the sixtieth Article of War, as a person serving with the armies of the United States in the field. "Persons serving with the armies," says Benet, (p. 29), "include all who derive their compensation from private sources as servants," etc. The article evidently refers to persons who connect themselves voluntarily with the army. After White was discharged, he insisted on his rights as a citizen; did not willingly connect himself with the command for any kind of service, and it seems to me

that the conduct of the officer in command was arbitrary and unjustifiable either by law or military necessity.

It has been held that a man may be aboard of a ship and be neither master, crew, cargo nor passenger, and that soldiers on board under the command of their officers are not passengers in the strict sense. (*The Steamer Merrimac*, 1 Benedict, 201.) In the case of *The Hanna*, 15 Law Times Rep. 334, Dr. Lushington held that one who had paid no passage-money, but who went on board at the request of the master and messed with him upon the understanding that he should do what he could in the work of the ship for his passage, was neither crew nor passenger; that he was, in fact, a nondescript.

White's status on board, after his discharge is equally hard to describe. This case must be decided on its own peculiar facts, and the question is whether, under all the circumstances, there was any breach of duty on the master's part.

The government had contracted for his transportation to San Francisco, and White would have no action against the master for a breach of that contract. (*The Merrimac*, *supra*.) White cannot sue as a passenger for a breach of the master's express or implied contract with him, for there was none. White came on board as a soldier, subject to the orders of the officer in command, and the master left him in that condition, and did transport him with the rest of the command, as the contract with the government required. Was the master bound to take notice of the change in White's relations to the military authorities which happened during the voyage—a change entirely independent of his contract and to which he had neither assent nor dissent to give? At the time White received the treatment complained of, he was dressed in army clothing and was messing with the soldiers. It seems to me that under these circumstances the master was not required to do more than he did do for White's protection. His duty, under the contract with the government, was to transport the two hundred and thirteen officers and men (White being one of them) to San Francisco, safely and securely. This he did. While this con-

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tract was being performed, it was not competent for the government, by the act of discharge, or White, by receiving it, to change its terms so as to give White new rights, or impose new obligations on the master. Therefore, when the master left White to the control of the military, as he was when he came on board, he violated no duty which the law imposed upon him as a carrier of passengers, under the existing contract.

Nor do I think it would be right, in any event, to hold that the master was bound to know and to say that White was not subject to military discipline. White wore the dress of a soldier, drew government rations and messed as and with the soldiers; and when the colonel insisted that he was a camp-follower and claimed a right to subject him to military discipline as such under the sixtieth Article of War, while I think the colonel, although appearances were in his favor, was wrong, it would be unreasonable to hold the captain responsible for an error in the construction of a law of the army with which and the practice under it, he was ignorant. Besides all this, the colonel with his two hundred and thirteen men, was able to enforce his construction of the article against the master, for the time being, if he saw fit, and he did manifest a determination to do so.

Upon the whole case, then, I think the libel must be dismissed, with costs, and it is so ordered.

IN RE JOHN A. CARR, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 27, 1875.

1. ALASKA, INDIAN COUNTRY.—Upon the extension of sections 20 and 21 of the Indian Intercourse Act of 1834 over the territory of Alaska by force of the act of March 3, 1873, said territory became, so far as the introduction and disposition of spirituous liquors therein is concerned, what is known in the law as "Indian Country," and, therefore, the military force of the United States may be employed therein for the arrest of persons who violate either of said sections.
2. SECTION TWENTY-THREE OF THE ACT OF 1834 IN FORCE IN ALASKA.—Section 23 of said Indian Intercourse Act which authorizes the President to employ the military force of the United States to make arrests in the Indian country, was in force in Alaska so far as the introduction and disposition of spirituous liquors therein is concerned, from and after the extension of said sections 20 and 21 of said act over said territory.
3. DETENTION OF PERSON ARRESTED IN INDIAN COUNTRY BY MILITARY AUTHORITY.—No person arrested by the military authority in the Indian country for the introduction or disposition of spirituous liquors therein, contrary to law, can be lawfully detained by such authorities more than five days after such arrest before removing him for delivery to the civil authorities for trial.
4. ARREST BY MILITARY AUTHORITIES NOT AUTHORIZED EXCEPT UPON PROBABLE CAUSE.—A military officer in making an arrest under said section 23 acts as an officer of the civil law, and to justify such arrest it must appear upon oath that there is probable cause, as provided in the fourth amendment to the Constitution of the United States.

Before DEADY, District Judge.

Joseph N. Dolph and Joseph Simon, for the petitioner.*Rufus Mallory*, for the respondent.

DEADY, J. Two questions are made in support of the demurrer to the return: 1. That section 23 of the Indian Intercourse Act of 1834 has not been extended to Alaska, and therefore the military force cannot be employed in the apprehension of persons who may be found introducing spirituous liquors into Alaska; and, 2. That although the military force might have been employed in arresting the petitioner upon such charge, yet he could only be held in

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such custody five days before removal to the civil authority authorized to proceed against him according to law.

It appears from the petition and return that the petitioner, being the collector of customs at Fort Wrangel, in Alaska, was arrested by Lieutenant Dyer, of the army, in the latter part of September, 1874, upon the charge of violating section 20 of the Indian Intercourse Act, by introducing spirituous liquors into the country, in the month of July, without the consent of the War Department; and that the petitioner was kept in custody by direction of Captain J. B. Campbell, commanding the district of Alaska, until the service of the writ herein on December 19, when he was sent in custody of Captain Jocelyn to this place, in obedience to the writ.

Section 1 of the Alaska Act of July 27, 1868, (15 Stat., 240) having been amended by the act of March 3, 1873, (17 Stat., 530), so as to extend over the territory of Alaska, sections 20 and 21 of the Intercourse Act of 1834, said Territory, so far as the introduction and disposition of spirituous liquors is concerned, became what is known as "Indian country;" and the military force of the United States may be employed by the President for the arrest of persons found therein violating either of said sections. To accomplish this result it was not necessary for Congress to extend section 23 of the Intercourse Act by name over Alaska. By force of its own terms that section applies to any territory of the United States declared by Congress, either in terms or effect, to be "Indian country"—that is, a country in which the intercourse between the whites and Indians is regulated and restrained by special acts of Congress. So soon, then, as Alaska was made "Indian country," so far as the introduction and use of spirituous liquors is concerned, section 23 of the act which authorizes the employment of military force became applicable to it, and in force therein.

The President, by means of the proper officers, has authorized the employment of the military to make arrests in Alaska for the violation of said sections 20 and 21. If, then, there was sufficient cause to arrest the petitioner for said offense, Lieutenant Dyer was authorized to make it,

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Of course in so doing he was merely acting as a police officer—as a marshal or constable—for the purpose of enforcing an act of Congress, and was not authorized to make the arrest unless it appeared upon oath or affirmation that there was probable cause as provided in the Fourth Amendment to the Constitution of the United States. It is a mistake to suppose that the Territory of Alaska is under military rule any more than any other part of the country, except as to the introduction of spirituous liquors and the making of arrests for violations of sections 20 and 21 aforesaid, in which case the military really act as civil officers and in subordination to the civil law.

As to the second point the demurrer is well taken. The petitioner having been detained over five days—indeed, nearly ninety—before any attempt was made to remove him for trial by the civil authorities, his detention thereafter became unlawful and unauthorized. The statute is peremptory upon the subject, and with good reason—“*Provided, That no person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before the removal.*” If the removal cannot be commenced in that time the prisoner must be discharged. It was supposed by Congress, as this proviso manifests, that these arrests would often be made at remote and out of the way places, where the prisoner would be comparatively helpless, without access to counsel or friends, and if the officer whose custody he was in was to be judge of when he would or conveniently could remove him to the civil authorities for trial, it might sometimes happen that the detention would be continued captiously or maliciously and the imprisonment become grossly oppressive. In *Barclay v. Goodale*, this Court, after able argument and full consideration of the premises, held that the defendant who had arrested the plaintiff under section 23 and detained him more than five days before removal, because he had no sufficient means wherewith to do otherwise, was liable for false imprisonment.

The petitioner is entitled to be discharged. I have also considered whether, upon the facts in the return, I ought

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now to commit the petitioner upon a charge of introducing spirituous liquors into Alaska, contrary to section 20 aforesaid. It is not alleged directly in the return that the petitioner was guilty of this offense, but only that he "was arrested for it." The evidence upon which the arrest was made is not stated in or attached to the return. I do not think the statement in the return is sufficient evidence or information to authorize a commitment by me.

The respondent then had leave to amend the return, and annex thereto, among other things, the affidavit of W. P. Wilson, taken before Lieutenant Dyer, on September 24, 1874, stating that in July he paid John A. Carr \$100 for the privilege of taking a lot of liquors out of the bonded warehouse at Fort Wrangel to be taken to his own house in Wrangel, while at the same time said Carr made out a clearance of the goods to Glencora landing, British Columbia.

Objection is made that this affidavit was not made before an officer authorized to administer oaths.

But it appears to have been duly taken in pursuance of paragraph 1031 of the army regulations of 1861, and upon it I will commit the petitioner to answer the charge, and fix his bail at \$2,500.

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IN RE C. B. COMSTOCK & Co.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 6, 1875.

1. PURCHASE AND SALE OF WHEAT.—Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard, at Portland, at \$1.85 per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one-half of the money necessary to make the purchase, and to receive one-half of the profits, if any: *Held*, that the joint venture and the interest of C. & Co. in the wheat ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & H. as sellers of the same, to exercise the right of stoppage *in transitu*, and that when, upon the failure of M. & H., said L. & H. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the same, and not that of C. & Co., who were not the sellers of the wheat to M. & H., and had no power over it or interest in it.
2. SETTLEMENT BETWEEN DEBTOR AND CREDITOR.—A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights or credits, to the prejudice of other creditors, is not contrary to the Bankrupt Act, but the assignee of such debtor is not bound by such settlement, but may show that it is erroneous or fraudulent.
3. PREFERENCE.—A preference will not bar the proof of a debt, unless it was given and received by the parties to such debt, and therefore where a creditor received a preference from the firm of A., B. & C., he is not barred from proving another debt against the firm of B. & C.

Before DEADY, District Judge.

Objections to proof of debt. The facts appear in the opinion of the Court.

William Strong, for the assignee.

John W. Whalley and *M. W. Fechheimer*, for the creditor.

DEADY, J. On December 16, 1873, a petition in bankruptcy was filed in this court against C. B. Comstock & Co., on which they were adjudged bankrupts on January 23, 1874.

Laidlaw & Gate proved a debt against the bankrupts of \$24,406.30, gold coin, with interest from November 25,

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1873, for money paid said Comstock & Co., on a contract to deliver said Laidlaw & Gate 10,000 quarters of wheat.

Prior to June 10, 1874, a dividend of forty-three per cent. was declared but not paid upon this claim, because on that day the assignee of the estate filed objections thereto, to the effect that on December 2, 1873, Comstock & Co. being insolvent and indebted to Laidlaw & Gate in the sum of \$43,809.66, with interest, to give them a preference, and in fraud of the act, delivered to said Laidlaw & Gate, in part payment of said indebtedness, 9,268.96 centals of wheat, worth about \$19,403.36; and that said Laidlaw & Gate, at the time of said delivery, had reasonable cause to believe that Comstock & Co. were insolvent.

The answer of Laidlaw & Gate denies the allegations of the objections, and avers that these 9,268.96 centals of wheat were delivered to Laidlaw & Gate by Comstock & Co. between November 1 and 13, 1873, upon a contract made on August 29, 1873; and that between November 6 and 10, 1873, Laidlaw & Gate advanced Comstock & Co. \$31,000, upon a contract to purchase and deliver 10,000 quarters of wheat, which Comstock & Co. wholly failed to perform.

After hearing the evidence and arguments of the parties, the register, Mr. H. H. Northup, on March 6, 1875, found the facts as follows: "On the twenty-ninth day of August, 1873, Laidlaw & Gate entered into a contract in writing with C. B. Comstock and Co. to purchase on joint account a cargo of from 4,000 to 5,000 quarters of wheat, the same being already sold by Laidlaw & Gate at \$1.85 per cental, to whom the wheat purchased by Comstock & Co. was to be delivered, the net profit to be equally divided."

About the twelfth of September, 1873, a verbal contract was entered into between Laidlaw & Gate and Comstock & Co., or "rather an arrangement," by which Laidlaw & Gate sold to the firm of Makin & Hubbak 10,000 quarters of wheat at \$2.15 per cental. On this contract no money was paid.

On the thirtieth of October, 1873, Laidlaw & Gate requested and authorized in writing Comstock & Co. to purchase on their account 50,000 bushels of wheat at \$1.80 per

cental. The price was afterwards advanced to \$1.90 per cental, Comstock reporting that he could not purchase at \$1.80.

On this contract of October 30, 1873, there was advanced by Laidlaw & Gate to Comstock & Co., on the sixth of November, 1873, \$6,000, and on the tenth of November, 1873, \$25,000, Comstock reporting that he had purchased, and held in warehouse ready for delivery, wheat to the amount of over that sum in value.

Between the third and twelfth of November, 1873, Comstock & Co. delivered on board the *Fifeshire* and *Santa Rosa*, two vessels then lying in the Wallamet at Portland, 9,268.96 centals of wheat, the delivery being noted in a book kept by Laidlaw & Gate, called "Cargo Book," and credit for so much wheat delivered, given to Comstock & Co., although no price was carried out. The agent to receive this wheat on board these vessels was one P. Cherry, who kept the book above named, an employee of Laidlaw & Gate, although his salary was charged to the "joint adventure," and thus one-half of it was paid by Comstock & Co.

On November 7, 1873, Laidlaw & Gate drew on Makin & Hubbak, the San Francisco firm to which the wheat was to be shipped, for \$16,132.74, the value of 8,631.98 centals of wheat at \$1.85 per cental and \$42.59 interest. This draft was dishonored and protested at San Francisco, on the thirteenth of November, 1873, and Laidlaw & Gate immediately advised thereof. At this time Comstock & Co. held a large quantity of wheat, "for," Comstock says, "the failure of Makin & Hubbak left me with a large amount of wheat on hand." Immediately on receipt of intelligence of the failure of Makin & Hubbak, Laidlaw & Gate exercised the right of stoppage *in transitu* over the 9,268.96 centals of wheat loaded on the *Fifeshire* and *Santa Rosa*, and, under instructions, handed over the charter parties of these vessels to Henry Hewett & Co., of Portland, agreeing with said Hewett & Co. to take an equal quantity of wheat in warehouse for that placed on board those vessels; which agreement was consummated.

Some time after the thirteenth of November, 1873, or

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perhaps on that very day, a controversy arose between Laidlaw & Gate and Comstock & Co. about this 9,268.96 cents of wheat; not in regard to its delivery nor respecting the title (for both parties seem to have treated the delivery to Laidlaw & Gate as binding on Comstock & Co., and vesting the title in Laidlaw & Gate), but as to the contract or contracts on which this wheat was delivered. Laidlaw & Gate claimed that it was all on the contract of August 29, 1873, at \$1.85 per cental. Comstock admitted that about three-fourths of it was delivered on the contract of August 29, 1873, which filled and completed that contract, but claimed that the remaining one-fourth was on the verbal contract of September 12, at \$2.15 per cental. This was denied by Laidlaw & Gate, who insisted that the verbal contract of September 13 was void, no money ever having been paid on it, and that if any wheat was delivered after filling the contract of August 29, 1873, it was delivered on the contract or request of October 30, 1873, at \$1.90 per cental.

This controversy continued until November 25, 1873, Comstock & Co. refusing to deliver any more wheat until the matter was settled and claiming damages by reason of large lots of wheat purchased for the verbal contract of September 12, for which he had paid more than \$1.90 per cental.

On November 25, 1873, a settlement was made and all prior contracts merged in the contract of that date. On the second of December, 1873, a credit appears on the books of Laidlaw & Gate to Comstock & Co., for the 9,268.96 cents of wheat.

The real point to be decided, in my judgment, is, when did the title to the wheat in question vest in Laidlaw & Gate.

From the evidence I find that on the second of December, 1873, and for some days prior thereto, Laidlaw & Gate had reasonable cause to believe that Comstock & Co. were insolvent, and if the title remained in Comstock & Co. until the entry on Laidlaw & Gate's ledger, a preference was taken under the Bankrupt Act.

I further find that on the twelfth day of November, 1873,

the last day on which wheat was delivered, Laidlaw & Gate did not have reasonable cause to believe that Comstock & Co. were insolvent, and that if the title then passed to Laidlaw & Gate, no preference was taken under the Bankrupt Act.

Laidlaw testifies that after the wheat was delivered on shipboard, Comstock & Co. had no further control over it. This is not controverted or denied, although Comstock was put on the stand. Laidlaw & Gate also on the thirteenth of November, 1873, exercised the right of *stoppage in transitu* over this wheat without any question by Comstock & Co., and more than that, disposed of it without any objection.

The controversy seems to have been as to which contract the wheat was delivered under, and further than that as to the amount of damages that Laidlaw & Gate should allow Comstock for other wheat that he then held. It is a recognized principle that the sale is not complete while anything remains to be done to determine its quantity if the price depends on this, unless this is to be done by the buyer. I think the wheat delivered was treated by both parties as belonging to Laidlaw & Gate, and the fact that credit was not entered in the books of Laidlaw & Gate until December 2, 1873, is not material. Credit for so much wheat was given in the "Cargo Book" at the time of delivery, and the amount of credit, it seems to me, is not material, particularly as neither party then knew the amount of credit to be given, and by the course of business this could not be determined until sometime after."

The register ruled that the proof of debt should stand as made, and the question was certified here for decision.

In the course of the inquiry before the register, all the dealings between Laidlaw & Gate and Comstock & Co., prior to August 29, 1873, consisting of contracts to purchase and deliver wheat to load particular vessels, were examined, and a great mass of testimony introduced which has no special bearing on the controversy.

It being shown by the evidence, and practically admitted, that up to the delivery of this 9,268.96 cents of wheat on

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the *Fifeshire* and *Santa Rosa*, to wit: November 12, 1873, Laidlaw & Gate had not reasonable or any cause to believe that Comstock & Co. were insolvent, it follows that if the property in the wheat vested in them at the time of such delivery, no preference was thereby given or received.

Comstock & Co. were engaged in purchasing wheat throughout the country for delivery to third persons for shipment abroad. Laidlaw & Gate having this contract with Makin & Hubbak, of San Francisco, to deliver them 4,000 or 5,000 quarters of wheat in September and October, employed Comstock & Co., as they had done in other like instances, to purchase the wheat and deliver it on ship-board for them. Instead of agreeing to pay them a certain commission for their services, it was arranged that Comstock & Co. should have a share of the profits, if any, made by Laidlaw & Gate on the venture, and that they should also advance one-half of the money necessary to fulfill the contract.

This being so, the transaction was a joint venture, commencing with the purchase of the wheat and ending with the delivery of it on the vessels at Portland. After the delivery on board, Comstock & Co. had no interest in the property, and so they seem to have understood the matter.

By the contract of August 29, Comstock & Co. did not become parties to the prior contract between Laidlaw & Gate and Makin & Hubbak, by which the former sold and were to deliver to the latter 4,000 to 5,000 quarters of wheat as above stated, at \$1.85 per cental. Between Comstock & Co. and Makin & Hubbak, there was no privity or relation. If Laidlaw & Gate made a profit on the transaction with Makin & Hubbak, Comstock & Co. were entitled to half of it and Laidlaw & Gate were liable to them for such share of the profits irrespective of the failure of Makin & Hubbak to meet their engagements with Laidlaw & Gate. As the owners of the property, Laidlaw & Gate exercised the right of *stoppage in transitu* upon the failure of Makin & Hubbak, and disposed of the wheat to Hewett & Co., as they had a right to. But for this the property would have long since figured in the assets of Makin & Hubbak.

The facts being found as stated, the failure to enter the value of the wheat in the ledger of Laidlaw & Gate at the time of delivery is immaterial. An entry in the books of a party, or the absence of it, may be evidence against him of more or less weight, owing to the circumstances, but is not conclusive. In this case the receipt of the wheat by Laidlaw & Gate from Comstock & Co. appears to have been regularly and duly entered in the cargo book of Laidlaw & Gate by their agent and employee, P. Cherry. Comstock & Co. were duly credited in the ledger with the amount of the wheat, but the *value* of it could not be entered until the cost on board was ascertained or agreed upon. By the terms of the agreement between Laidlaw & Gate and Comstock & Co., the latter were to be credited with the wheat at the cost and charges on board, not exceeding the price at which it was sold to Makin & Hubbak. Owing to the disagreement between Laidlaw & Gate and Comstock & Co. as to what contract 636.98 cents of the wheat delivered on the *Ffeshire* and *Santa Rosa* was to be accounted for—whether that of August 29, at \$1.85 per cental, or that of September 12, at \$2.15 per cental, or the order of October 30, at \$1.90 per cental—and the claim by Comstock & Co. for damages on account of wheat purchased at a high figure on a falling market under the contract of September 12 and not received by Laidlaw & Gate, there was a delay in ascertaining the value of this wheat and the amount with which Comstock & Co. were to be credited on account of it. Finally, on November 25, the parties had an accounting and settlement, Comstock & Co. having the advantage of being Laidlaw & Gate's debtors for \$31,000 advanced to them, seem to have dictated the terms of the settlement, by which they were allowed the full price they had paid for all wheat delivered up to that time. The sum due upon the wheat to Comstock & Co. was deducted from the \$31,000, and for the balance Laidlaw & Gate prove their claim. This accounts satisfactorily for the delay in making the final entry in the ledger of Laidlaw & Gate.

It is also quite possible that this settlement may have been acquiesced in by Laidlaw & Co. upon the impression

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that Comstock & Co. were in a doubtful condition financially, and that it was better to close with them upon their own terms before they failed. Upon its face the writing wears the look of a device intended to reach backward and give a new color to past transactions with a view of protecting them from some new and impending danger. Its language is probably the result of carelessness or ignorance, or an attempt to cover more ground than was necessary or the facts authorized. While there is no reason to doubt but that it states the result of the settlement truly, to wit, that Comstock & Co. should be allowed full cost for all the wheat delivered to Laidlaw & Gate without reference to the limitation of \$1.85, \$2.15, or \$1.90 per cental under which it was purchased, yet it does not represent the transaction according to the facts proven by the evidence.

Here is a copy of the agreement, which appears to be in the handwriting of Comstock:

PORTLAND, Oregon, 25 November, 1873.

Messrs. Laidlaw & Gate, Portland—GENTLEMEN: We have this day sold you, and we confirm the sale by this letter, ten thousand quarters of good merchantable Oregon wheat, to be delivered in Portland warehouses. The price you are to pay us for it is to be the price we actually have paid, with any charges that may be incurred up to the time of delivery. Cash to be paid against warehouse receipts. We acknowledge to have received on account of this sale the sum of thirty-one thousand dollars, less the amount of your present debt to us, which is estimated at about six thousand dollars.

(Signed)

We are, yours truly,

C. B. COMSTOCK & CO.

No wheat was in fact sold to Laidlaw & Gate by that agreement or on that date, as therein assumed and represented. The contract of September 12, if valid and binding, was the latest one between the parties for the delivery of wheat, and the last wheat delivered by Comstock & Co. under any contract or order was delivered on November 12, 1873.

It is not necessary to the decision of the question arising upon the objections to find whether Laidlaw & Gate had reasonable cause to believe that Comstock & Co. were insolvent at the date of this settlement. But assuming that they had such cause so to believe, the rights of the general creditor, as represented by the assignee, would not be impaired by such settlement. A creditor and debtor have a right to state an account and strike a balance, although the former may know that the latter is then insolvent. A mere accounting between parties does not prefer the creditor or diminish the assets of the debtor. But if the debtor is adjudged a bankrupt, the assignee, representing the general body of creditors, is not bound by such settlement, and if found incorrect or fraudulent it will be disregarded. A settlement or accounting with an insolvent debtor, particularly where the parties, as in this case, use language calculated to make an erroneous impression as to the facts of the transaction, will naturally, if favorable to such creditor, excite the suspicions of the other creditors, and should be closely scrutinized; but in itself, if honestly and fairly conducted, there is nothing illegal or contrary to the Bankrupt Act.

In this case the result of the settlement, however the language in which it is stated may be open to criticism, appears to have been as favorable to Comstock & Co. as it should, and therefore the other creditors were not prejudiced by it. If, however, the assignee has reason to think otherwise, he is at liberty to raise the question whether the sum claimed—\$24,406.30—was really due Laidlaw & Gate from Comstock & Co. on November 25, 1873.

Upon the hearing before the Court, it was argued by counsel for the assignee that the contracts between Laidlaw & Gates and Comstock & Co., of August 29 and September 12, made them partners *inter se* in the purchase and delivery of wheat to Makin & Hubbak, and that therefore the property in this wheat never vested in Laidlaw & Gate, but remained the property of this special partnership, composed of Laidlaw & Gate and Comstock & Co. It is not found by the register whether this was a partnership transaction or not, and it is immaterial to the decision of the question

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before the Court how the fact is. It is not probable, upon this evidence, that the parties intended to constitute a partnership, even between themselves, and unless they did so, none would result. (*In re Francis*, 2 Sawyer, 286.) But admitting they were partners, and that this fact in some way, which is not apparent, prevented a delivery of the wheat from being made to Laidlaw & Gate, and from them to Makin & Hubbak, as is claimed by the creditor, and that the wheat, therefore, remained the property of this special partnership until it was delivered to Makin & Hubbak on shipboard, and that the stoppage *in transitu* by Laidlaw & Gate, members of this partnership, upon the failure of Makin & Hubbak, restored the wheat to such partnership, what follows? In that case the wheat was never the property of Comstock & Co., and would not be an asset of their estate in bankruptcy; nor would their creditors be entitled to the benefit of it. On the contrary, it belonged to this special partnership of Laidlaw, Gate, and Comstock & Co., whoever the Co. might be, and was an asset of such firm. The supposed firm of Laidlaw, Gate and Comstock & Co., made no profits but a loss. On November 1, Comstock & Co. owed this firm or Laidlaw & Gate, as the case may be, \$12,646.66. The 9,268.96 cents of wheat placed on the *Fifeshire* and *Santa Rosa* cost on board \$19,403.46, leaving a balance in favor of Comstock & Co. and against Laidlaw, Gate and Comstock & Co. of \$3378.40, that being one-half of the difference between the value of the wheat and the debit to Comstock & Co. In addition to this, Comstock & Co. owed Laidlaw & Gate \$31,000.

Now, this alleged firm of Laidlaw, Gate and Comstock & Co. did not owe Laidlaw & Gate anything, and therefore could not prefer them. But if there had been a preference given by such firm to Laidlaw and Gate, it could not have the effect to prevent Laidlaw & Gate from proving another debt against a different firm, to wit, that of Comstock & Co. An unlawful preference only bars the proof of a debt between the parties to the preference. The only effect that can be given to this theory of a special partnership in this case is that Laidlaw & Gate, by appropriating the proceeds

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of the wheat loaded on the *Fifeshire* and *Santa Rosa*, obtained the said sum of \$3378.40 of the assets of said partnership more than they were entitled to, and that they are liable to the assignee of Comstock & Co. for the same. In a suit brought to recover the amount, the question would arise whether Laidlaw & Gate could set off a like amount of the \$31,000 which Comstock & Co. owed them at the time.

But it is unnecessary to further pursue this inquiry. In any view of the matter, I think Laidlaw & Gate are entitled to prove their debt as claimed by them. I am satisfied upon the evidence that whether the transaction between Laidlaw & Gate and Comstock & Co. be considered a joint venture, or a special partnership, as between themselves, it ended with the delivery of the wheat on shipboard, and that thereafter Comstock & Co. ceased to have any interest in the property, and that the same was the wheat of Makin & Hubbak, sold to them by Laidlaw & Gate, who, in relation to it, had the rights of a seller, including that of stoppage *in transitu*.

It is therefore ordered that the proof of debt by Laidlaw & Gate be allowed to stand, and that they be paid the dividend of forty-three per cent. heretofore declared upon it, with the interest accruing thereon, if any.

T. D. PARKINSON v. E. B. LASELLE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

APRIL 23, 1875.

1. COPYRIGHTS.—Under sections 4952 and 4956 of the Revised Statutes of the United States, an author cannot obtain an exclusive right to his work unless before publication he delivers to the librarian of Congress, or deposits in the mail, addressed to him, a printed copy of the title of the work or map; and, also, within ten days from the publication, deliver to the said librarian, or deposit in the mail, addressed to him, two copies, thereof.
2. SAME—DEMURRER TO BILL—A bill in chancery to restrain the infringement of a copyright, acquired under Chapter III, Title LX, of the Revised Statutes, which does not allege the performance of the acts required to be performed by the author in section 4956 of said statute, is insufficient.

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Statement of Facts.

Before SAWYER, Circuit Judge.

Bill in equity to restrain the infringement of a copyright to a map of the Comstock lode. The defendant demurred specially on the ground that the bill does not allege the delivery at the office of the librarian of Congress, or a deposit in the mail addressed to said librarian, of a copy of the title of the map before its publication, or a delivery to said librarian, or a deposit in the mail, addressed to him, of two copies of said map within ten days from its publication. The copyright is claimed to have been obtained on October 2, 1874. Section 4952 of the Revised Statutes, then in force, provides, that "any citizen of the United States * * * who shall be the author * * * of any * * * map * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." Section 4956 provides that "No person shall be entitled to a copyright unless he shall before publication deliver at the office of the librarian of Congress, or deposit in the mail, addressed to the librarian of Congress, at Washington, District of Columbia; a printed copy of the title of the book or other article * * * for which he desires a copyright, nor unless he shall also, within ten days from the publication thereof, deliver at the office of the librarian of Congress, or deposit in the mail, addressed to the librarian of Congress, at Washington, District of Columbia, two copies of such copyright, book or other article." * * * Section 4959 provides that "The proprietors of every copyright book or other article, shall deliver at the office of the librarian of Congress, or deposit in the mail, addressed to the librarian of Congress, at Washington, District of Columbia, within ten days after its publication, two complete copies thereof, of the best edition issued." * * * Section 4960, that "For every failure on the part of the proprietor of any copyright to deliver or deposit in the mail either of the published copies, or description or photograph, required by sections 4956 and 4959, the proprietor of the copyright shall be liable to a

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penalty of twenty-five dollars, to be recovered by the librarian of Congress in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found." And section 4962, that "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following it, if it be a book, * * * or if a map * * * by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress in the year . . . by A. B. in the office of the librarian of Congress at Washington."

B. Morgan, for complainant.

L. D. Latimer, for defendant.

SAWYER, Circuit Judge. It is settled by the Supreme Court in *Wheaton v. Peters*, 8 Pet. 591, that every act required by the act of Congress of May 3, 1790 (1 Stat. 124), and of April 29, 1802 (2 Stat. 171), relative to copyrights, is essential to the title derived under those acts. Unless he performs every act required by these statutes, the author acquires no exclusive right. (See, also, *Jollie v. Jaques*, 1 Blatch, 618; and *Baker v. Taylor*, 2 Blatch, 82.) The authority of these decisions is not questioned by complainant, but it is insisted that the present statute is different and requires a different construction. On the contrary, it appears to me to be more difficult under the present statute to escape the construction adopted by the Supreme Court in *Wheaton v. Peters*, than under the former acts.

Under section 3 of the act of 1790, there was some ground for claiming, that it was only necessary to deposit a printed copy of the title to a book or map, in order to secure a copyright; and that the provisions of the latter part of this section, and in section 4, for publication of a copy of the record, and the delivery of the copy of the work, were

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merely directory, or at most, conditions subsequent. But there is no ground for such claim under the present act. Under section 4952 of the revised statutes, an author of a book or map, is to have the sole liberty of printing * * * and vending the same," only "upon complying with the provisions of this chapter," that is to say, all the provisions, for no exception is made. No one provision is referred to rather than another. As the statute has not limited the acts to be performed to any one provision less than the whole, the courts have no authority to say that any one rather than another, less than the whole is sufficient. Section 4956, in express terms, declares that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of the book or other article, etc.; nor unless he shall, also, within ten days from the publication thereof, deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, two copies of such book, or other article," etc. There is no possible room for construction here. The statute says no right shall attach until these acts have been performed; and the Court cannot say in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated.

It is claimed by the complainant, that section 4962 prescribes the essentials necessary to authorize the maintenance of the action; and that the Court cannot add others. It is upon this section that it is sought to distinguish this case from those arising under former acts, which did not contain the provision. The provision relied on is, that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in his several copies of every edition published * * * if it be * * * a map * * * by inscribing upon some portion of the face or front thereof, or on the face of the substance

on which the same shall be mounted, the following words: 'Entered according to Act of Congress, in the year——, by A. B., in the office of the librarian of Congress at Washington.'" But the difficulty in adopting the complainant's view, is, that a cause of action must exist before an action can be maintained; and there can be no cause of action till a right exists, and that right has been violated.

Under sections 4952 and 4956, the plaintiff can have no copyright till he has performed the prescribed conditions, and until he has acquired his copyright, there can be no violation of that right at all which can afford a ground of action. Instead of section 4962 being a limitation of the acts to be performed, or alleged in order to entitle a party to maintain an action, it imposes an additional duty upon him as a prerequisite to its maintenance. He must first acquire a copyright under the other provisions of the act, and then, in order to enforce his right against infringers he must, also, give notice of his right by the means prescribed by section 4962, so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision. An analogous provision, and for a similar purpose, copied from previous acts, is found in section 4900, relating to patent rights.

The complainant's claim can derive no argumentative support against the express negative provisions of the statute already cited and discussed, from section 4960, providing for a penalty to be recovered from the author on failure to perform all the conditions prescribed. This seems to be intended to furnish additional guarantees against attempts of parties to avail themselves of the benefits of a copyright without first performing all the conditions prescribed in order to confer the right.

The demurrer must be sustained, and it is so ordered, with leave to amend on the usual terms.

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Opinion of the Court—Deady, J.

MARCUS NEFF v. SYLVESTER PENNOYER.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 26, 1875.

1. **EXPENSES OF PRINTING BRIEF.**—Section 918 of the Revised Statutes gives to the Circuit Court power to regulate the practice therein, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the Supreme Court: *Held*, that under this authority the court might by general rule or special order in a particular case require parties to a cause submitted to it for decision, to file printed briefs and might tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement.

Before DEADY, District Judge.

APPEAL from taxation of costs by clerk.

H. Y. Thompson, for the defendant.*John W. Whalley*, for the plaintiff.

DEADY, J. The plaintiff in this action having obtained judgment, filed a statement of costs and disbursements as provided in section 546 of the Oregon Code of Civil Procedure amounting to \$86.47. The defendant objected to the item of \$45 "for printing brief under the direction of the court." The clerk allowed the charge and the defendant appealed to the court. (See section 547 of said Code.)

In *Ethridge v. Jackson*, 2 Sawyer, 598, this court held that by force of section 34 of the Judiciary Act (now section 721 of the Revised Statutes) the law of the State regulating the allowance of costs and disbursements in civil actions at law was applicable to such actions in this court, unless where otherwise provided by Congress.

Upon the argument of the appeal it was assumed by counsel that the allowance or rejection of the charge turned upon the construction of section 543 of the Oregon Code of Civil Procedure, which provides, that: "A party entitled to costs shall also be allowed for all necessary disbursements

including the fees of officers and witnesses," etc. But this is a mistake. Section 984 of the Revised Statutes (section 20 of the act of 1853, 10 Stat. 161), prescribes what items of disbursement shall be taxed in favor of the prevailing party as follows: "The bill of fees of the clerk, marshal and attorney and the amount paid printers and witnesses * * * in cases where by law costs are recoverable in favor of the prevailing party shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."

The Revised Statutes (section 853) prescribe a printer's fee "for publishing any notice or order required by law or the lawful order of any court * * * in any newspaper," but do not provide any compensation for printing briefs.

But section 918 gives the court power to regulate practice therein, "as may be necessary and convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the Supreme Court. The order in this case requiring the parties to file printed briefs was an order regulating the practice in the same, within the purview of this section. The printing and filing of such briefs was deemed "necessary and convenient" for a right understanding of the case, and therefore "the advancement of justice" therein. The Supreme Court of this State has, by rule 28 (2 Or. 15), required printed briefs to be filed in all cases heard in that court, and it is the practice therein, to tax the costs of such briefs in favor of the prevailing party as a "necessary disbursement," by reason of such rule.

The sum paid the printer by plaintiff for printing his brief is tacitly admitted to be a reasonable one. No objection is made to it on that ground. If the expense was incurred under a lawful order of this Court, it is a necessary disbursement and ought to be taxed against the defendants.

The question turns, I think, upon whether the court had power under section 918, *supra*, to require the plaintiff to incur the expense of printing his brief. If it had, it seems to follow as a matter of course that it can provide that such

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expense be taxed against the defendant as a proper and necessary disbursement in the case.

Now as to the power of the Court to require the printing of the brief, there is hardly room for doubt. The order is not inconsistent with any act of Congress or rule of the Supreme Court. It is such an one as all courts of record, in the exercise of the power inherent in them to regulate the practice before them, are accustomed to make. It rests upon the same ground as the power of the Supreme Court of the State to make rule 28, *supra*, as well as rule 24, authorizing the clerk to tax against the losing party, as part of his costs, the sum of three dollars as a compensation for recording the opinion of the Court. The taxation of the clerk is affirmed, with costs.

THE UNITED STATES v. MARK WINSLOW.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 7, 1875.

1. **INDICTMENT FOR SELLING LIQUOR TO INDIANS.**—In an indictment under section 2139 of the R. S. for disposing of spirituous liquors to an Indian, it is necessary to allege that the defendant is not an "Indian in the Indian country."
2. **INDIAN IN INDIAN COUNTRY.**—The exception in said section, "an Indian in the Indian country," does not apply to the offense, but only to the person who may commit it.
3. **OREGON—INDIAN COUNTRY.**—Section 5 of the act of June 5, 1850, (9 Stat. 437), making Oregon Indian country, so far as the disposition of spirituous liquors to Indians is concerned, is not repealed by section 5596 of the R. S.
4. **AN INDICTMENT VOID FOR UNCERTAINTY.**—An allegation in an indictment that the defendant did the act charged "on or about" a certain day is void for uncertainty; it does not show but that the action is barred by lapse of time.

Before DEADY, District Judge.

The facts appear in the opinion of the Court.

Rufus Mallory, for the plaintiff.

John M. Gearin, for the defendant.

Opinion of the Court—Deady, J.

May,

DEADY J. The indictment in this case charges that the defendant, on or about February 1, 1875, in the county of Yamhill and State of Oregon, did dispose of spirituous liquors to one Bill, an Indian who resides upon the Grande Ronde Indian agency, who was then and there, and is now under the charge of P. B. Sinnott, an Indian agent appointed by the United States, *contra formam statuti*, etc. The defendant demurs to the indictment because: 1. It does not state facts sufficient to constitute a cause of action; and, 2. The allegation as to time is uncertain and void.

The material part of the statute under which the indictment was found reads as follows: "Every person except an Indian, in the Indian country, who sells, exchanges, gives, barter or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent * * * shall be punishable," etc. (R. S., sec. 2139.

Under the first cause of demurrer it is maintained that the indictment should have contained an allegation to the effect that the defendant was not "an Indian in the Indian country," and that without such allegation, negating this exception in the statute, no violation of it is alleged.

In answer to this, the District Attorney assumes that the State of Oregon is not Indian country, and therefore it is impossible that the defendant could come within the exception; which obviates the necessity of negating it in the indictment.

Section 5 of the act of June 5, 1850, provided: "That the law regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon."

It has always been held that the effect of this provision was to make Oregon, so far as the disposition of spirituous liquors to Indians is concerned, Indian country. (*U. S. v. Tbm*, 1 Or., 27; *U. S. v. Seveloff*, 2 Sawyer, 311.) Nor is this provision repealed by the Revised Statutes; for although a "portion" of the act of June 5, *supra*—parts of sections 2 and 4—are embraced in sections 2046 and 2052 of said statutes, yet it is not "affected" by them, for being merely

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a local provision, it is expressly reserved from the operation of the repealing clause of section 5596 of said statutes.

Assuming, then, that Oregon is Indian country, so far as the charge in this indictment is concerned, it becomes material to inquire whether this clause, "except an Indian in the Indian country"—should have been negatived in the indictment. The general rule is, that when there is an exception in the enacting clause, the indictment must show that the defendant is not within it. (1 Bish. C. P., sec. 375 *et seq.*; 1 Whar. C. L., sec. 379; 1 Chitty's C. L., 284; *U. S. v. Pond*, 2 Curtis, 268; *Dawson v. The People*, 25 N. Y. 399; *Rex v. Stone*, 1 East. 639; *Rex v. Earnshaw*, 15 East. 456.)

Is this exception within the enacting clause of section 2139 *supra*? It is hardly contended that it is not, and I think there can be no doubt but that it is. It is a part of the clause which defines the offense, or the person who may commit it. By reason of it, the description of the offense is so limited, that as to "an Indian in the Indian country," the act of disposing of spirituous liquor to an Indian is not a crime. In other words, such act is not a crime unless done by a person other than "an Indian in an Indian country;" and so it must appear from the indictment that the defendant is a person other than such an Indian. The familiar case under the statutes making it a crime to sell spirituous liquor without license or special tax therefor is in point. The qualifying clause in regard to the license or tax is considered an essential part of the description of the offense, and an indictment under the statute which should fail to show that the selling was done by a person without a license or who had not paid the special tax, would be insufficient.

It has also been suggested that the exception in section 2139, *supra*, extends to the offense as well as to the offender—to the act of disposing of the liquor as well as to the person disposing of it. This construction would divide the exception into two separate and independent clauses, the first one, "an Indian," qualifying the word "person" in the phrase "Every person;" and the second one, "in the Indian country," qualifying the following part of the sen-

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tence or the verbs "sells, exchanges," etc., or the word "Indian" following them. Upon this theory of the purpose of the act the sentence is very awkwardly and ungrammatically constructed. If the second clause was inserted in the sentence for the purpose of limiting its operation to cases where the liquor is sold to an Indian "in the Indian country," it should have been placed after the word "Indian" in the third line of the sentence, so that it would read: "Every person, except an Indian, who sells, exchanges, gives, barter or disposes of any spirituous liquors or wine to any Indian, in the Indian country * * * shall be punishable," etc.

But according to what I consider the proper construction of the sentence, these qualifying clauses are now naturally and properly placed therein. The first one, "except an Indian," as has been said, qualifies the word "person" in the preceding phrase "Every person." The universality of this phrase is thus limited, so that it shall not include "an Indian," and so far an Indian cannot commit a crime by disposing of liquor to another Indian. The same result, so far as Indians are concerned, might have been accomplished by enacting—"Every white person who sells," etc.

As this provision stood in section 20 of the act of June 30, 1834, as amended by act of March 15, 1864 (13 Stat. 29), this exception concerning Indians was not in it. The phrase "Every person" was used without qualification. Accordingly, this Court in *United States v. Shaw Mux*, 2 Sawyer, 364, held that the word "person," as therein used, included an Indian, and therefore he could be punished for disposing of liquor to another Indian in charge of an Indian agent. It may be that this clause was inserted in the sentence by the revisers on account of that decision.

The second clause of the exception, "in the Indian country," was evidently added for the purpose of qualifying and restraining the first one, so that "an Indian" simply is not excepted from the phrase "every person," but only "an Indian in the Indian country." Neither of these clauses has any relation to the offense but only to the persons who may commit it. The general policy of the law being as shown by

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section 2146 R. S., to leave the conduct of Indians in the Indian country as between themselves, to the tribal law, the second exception which limits the first one so that only Indians in the Indian country are excluded from the operation of section 2139, *supra*, is in harmony with such policy. But as to Indians not "in the Indian country," the effect is to leave them within the purview of the section and punishable for any violation of it.

Besides, the qualifying clause as to the offense—that the Indian to whom the liquor is disposed must be "under the charge of an Indian superintendent or agent," shows plainly that the intent of the law-maker was to make the act of disposing of liquor to an Indian a crime, without reference to the fact of the place of disposal, provided the Indian was at the time under the charge of an Indian agent. This qualifying clause was first introduced into section 20 of the act of 1834, *supra*, by the act of 1862. (12 Stat. 339.) The effect of it was to limit the operation of the section, so far as the disposition of liquor to Indians is concerned, to the Indians under the charge of a superintendent or agent, whether within or without the Indian country. (*United States v. Shaw Mux, supra.*) In this condition of the section it was held by the Supreme Court in *United States v. Holliday*, 3 Wall. 416, that it was a crime to sell liquor "to Indians under charge of a superintendent or agent, wherever they might be."

The compilers of the revised statutes have preserved this radical change, which made the criminality of the act of giving liquor to an Indian depend upon his being under charge of an agent, and not the character of the country where it took place, but added the qualification, "except an Indian in the Indian country," which excludes such Indians, and only such, from the category of persons who may commit the crime. In effect, this exception restores the qualification made to section 20, *supra*, by section 3 of the act of March 27, 1854 (10 Stat. 270), which provided that nothing contained in said section should "extend to any Indians committing said offenses in the Indian country." (*United States v. Shaw Mux, supra.*)

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The demurrer in this respect is well taken. It is also well taken upon the second ground. Every indictment must allege a day and a year certain on which the offense was committed. (1 Bish. C. L., Sec. 239.) This is the common law rule. The Code of Criminal Procedure of this State, which has been adopted by this Court as a rule of practice, does not change the law. On the contrary, the form of an indictment given in section 70, indicates an absolute averment as to the time of committing the offense. An allegation that a crime was committed "on or about" a certain day, does not show but that the action is barred by lapse of time.

The demurrer must be sustained.

IN RE S. MENDELSON.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JUNE 8, 1875.

1. RIGHT OF ATTACHING CREDITORS TO OPPOSE ADJUDICATION.—An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy on the ground of fraud and collusion between the petitioner and debtor.
2. ASSIGNMENT AS AN ACT OF BANKRUPTCY.—Even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the Bankrupt Act.
3. IDEM.—Within the meaning of the law defining acts of bankruptcy an assignment, invalid under the laws of the State where made, but used as a means for giving a preference, is an act of bankruptcy.

Before HILLYER, District Judge.

D. Mendelson filed his petition praying an adjudication of bankruptcy against his brother, S. Mendelson. On the return day of the order to show cause, the alleged bankrupt, S. Mendelson, did not appear and on motion a default was entered, and thereupon an adjudication was asked for. At this stage in the proceedings certain creditors appeared and asked leave to intervene and contest the facts in the petition. They allege in their petition that they are

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creditors and have a lien, by attachment, on the goods of the debtor; that the proceedings for adjudication is collusive and fraudulent, and the alleged debt of the petitioning creditor a sham.

The petitioning creditor objected to their being allowed to contest his petition, upon the ground that until an adjudication the case is solely between himself and the debtor. This question was reserved, and testimony was taken upon the petition of intervention and the whole case submitted.

One of the acts of bankruptcy charged in the petition for adjudication was that the debtor made an assignment of his property to Messrs. Davis & Co. with intent to give a preference to one or more of his creditors and to defeat or delay the operation of the act. An assignment was in fact executed by the debtor to Davis & Co. purporting to be in trust for all his creditors. The circumstances attending this assignment were that one Stone, the agent of Davis & Co., was pressing the debtor for payment of their claim, and procured the execution of the assignment with the understanding, as he says, that Mendelsohn should remain in possession of the goods, and carry on the business as before its execution; that on Monday of each week the debtor should pay \$75, to be applied to the payment of creditors whose claims exceeded \$100, and that Mendelsohn should provide for the payment of the small creditors himself. The arrangement was so far acted on that some \$150 were paid to Stone, which is now on deposit for the benefit of the creditors who are entitled to it.

Marcus Rosenthal, for petitioning creditor.

F. G. Newlands, for intervening creditors.

HILLYER, J. The first question is as to the right of these creditors having attachments to intervene and oppose the adjudication at this time.

That the creditors now asking to intervene have a direct interest in opposing the adjudication is plain. They have attached the debtor's property, and if proceedings in bankruptcy do not go forward, will have a lien thereon for their

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security. If, however, there is an adjudication and an assignment their attachment will be dissolved, and their right to prosecute their suit to judgment suspended. Such being the case, it cannot well be maintained that there is no relief for these attaching creditors, if it be true, as alleged, that the debt of the petitioning creditor is not a just debt, and yet the debtor colluding with him admits it, and consents to an adjudication. A court of equity would grant relief against, and annul a decree so obtained by fraud, for fraud infects and corrupts the judgments of all courts. (Story's Equity Pl., Sec. 426.) In some form, then, it must be admitted that persons whose rights are injuriously affected by a fraudulent adjudication may apply for and obtain relief. No court ought or can close its ears to this petition. An intervener, it is said, may come in at any stage of the cause, even after judgment, if an appeal can be allowed on such judgment. (Bouvier, *verb.* Intervention.) The question is essentially one of practice, and to my mind it is better in every aspect of it, to allow the attaching creditors to come in and be heard before the adjudication, than to wait until a decree is made and compel them then to impeach it for the fraud which would have defeated it in the first instance. I think, therefore, that these parties showing that they have a direct interest in defeating an attempted fraud like the one set up, should be allowed to intervene before the adjudication for the protection of their interest.

I am aware that there have been decisions which at first blush seem to be against the practice here adopted; but on examination they will, most of them, be found not really so, and to differ from the present case either in the fact that the adjudication would not have the effect to render unavailing any security of the creditors petitioning to intervene, or that the petitioners were mere creditors with no other claim to be heard. (*In re Bush*, 6 N. B. R. 179; *In re Railroad Co.*, 5 N. B. R. 232.)

Looking, then, to the evidence for and against the validity of the petitioning creditors' debt, I find that the interveners have failed in their attempt to show it to be fraudulent. That leaves for decision the question whether the assignment was an act of bankruptcy?

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The weight of authority is decidedly that even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the Bankrupt Act, and hinders and delays creditors.

But it is said that this assignment was void, and could not therefore be an act of bankruptcy, and it is clear that under the Code of California it was not a valid assignment. But admitting the assignment to be so defective that it could not be enforced, it is, it seems to me, looking to the use made of it in this case, as much an act of bankruptcy as if it had been executed with all the forms. The attaching creditors say they knew from the first that it was void as an assignment, but sought to make the debtor believe it was valid in order to use it as an instrument for collecting their debts. The debtor appears to have so believed, and admits it was made with a view to giving a preference to some of his creditors, and says he named six creditors to Stone, whom he wanted paid first.

Here, then, was, to all intents and purposes, a transfer of the debtor's property, and acting upon it, he paid over the agreed sum per week to the creditors entitled under the assignment to share therein. Under the thirty-ninth section "any conveyance or transfer with intent to prefer" is an act of bankruptcy. The assignment in this case, though invalid as an assignment under the laws of California, was an attempt to transfer property with intent to prefer certain creditors named by the debtor.

A construction of section 39 is inadmissible, which would permit a debtor to do that by means of an invalid instrument, which he could not do by one properly executed.

The Bankrupt Act cannot be defeated by omitting some of the forms in executing the assignment, and then setting up such omission in defense to proceedings in bankruptcy.

Within the meaning of the law defining acts of bankruptcy, I think this was an assignment, and made with the intent charged, so that on the whole case there must be an adjudication of bankruptcy as prayed.

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W. B. BRADBURY, ASSIGNEE, v. JAMES GALLOWAY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JUNE 8, 1875.

1. BANKRUPT LAW—AMENDMENTS OF JUNE, 1874.—Section 10 of the Amendatory Act, changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect.
2. IDEM.—Section 11 of the same act substituting “knowing” for “reasonable cause to believe,” if it has any, has no greater retroactive force than the similar provision of the new section 39, and does not affect transactions happening before December 1, 1873, in cases where bankruptcy proceedings were begun before that date.

Before HILLYER, District Judge.

On demurrer to the complaint of the assignee.

Wm. H. Fifield, for plaintiff.*Joseph Naphtaly*, for defendant.

HILLYER, J. The petition for an adjudication of bankruptcy against the bankrupt, Julia Lyons, was filed April 9, 1873, and the fraudulent preference is alleged to have been given January 3, 1873, more than two but less than four months before the filing of the petition.

If the right of the assignee to recover is to be controlled by section 35 of the bankrupt act, as it stood before the passage of the amendments of June, 1874, the demurrer must be overruled; if by sections 10 and 11 of the amendatory act, sustained.

The question presented, therefore, is whether those sections of the amendatory act are retroactive and affect transactions done and proceedings commenced before the passage of the act of June, 1874, and before the first day of December, 1873.

The bankrupt, Julia Lyons, was not adjudicated such until July 16, 1874, and the learned judge of this court then held that the case was not affected by section 12 of the amendatory act, because the petition had been filed before the first day of December, 1873. That section is by its terms made applicable to all cases of involuntary bankruptcy commenced since the last mentioned date. On the

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other hand, section 10, changing the period of four to two months, is by its terms not to take effect until two months after the passage of the act. So far, then, as section 10 is concerned, there is no room for doubt as to the intention of the Legislature. The language shows clearly that it is to have no retrospective operation, and is not to affect transactions happening before the time fixed for it to take effect.

To give the section any retroactive force is to accuse Congress of the absurdity of saying in terms that it should take effect prospectively, when the intention was that it should take effect retrospectively. And it would be idle to fix a time in the future for a provision to take effect if when it did go into effect it was to operate on transactions occurring not only before, but after its passage, and up to the time fixed for its going into operation. I have no doubt on this point, and hold that section 10 does not affect transactions past when it took effect, or proceedings commenced before that time. As to such matters section 35 is not repealed or amended. (See *Singer v. Sloan*, 11 B. R. 433.)

Section 11 of the act of June, 1874, substituting "knowing" for "reasonable cause to believe," in section 35, has no time fixed for going into operation, and according to the general rule takes effect from the time of its passage. It is urged, however, that this suit, brought since the passage of the act of June 22, 1874, though based on acts done before that time and before December 1, 1873, can only be maintained by alleging and proving actual knowledge on the part of preferred creditors that a fraud was intended, and not merely "reasonable cause to believe."

In a case in the eastern district of Wisconsin, like the one at bar, except that the suit by the assignee was begun before June 22, 1874, it was held that the amendatory act did not affect the right of the assignee to sue and recover upon the grounds and provisions contained in sections 35 and 39, as they stood before the amendments. (*Hamlin v. Pettibone*, 10 B. R. 173.) In *Brooke v. McCracken*, 10 B. R. 461, the bankruptcy proceedings were begun and the preference given after December 1, 1873, and it was held that the

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amendments to section 35 were not retroactive. The same conclusion was reached by the District Court of Michigan, in the case of *Van Dyke v. Tinker*, 11 B. R. 308, a case which cannot be distinguished from this. The contrary was held in *Singer v. Sloan*, *supra*, upon a case like *Brooke v. McCracken*.

In compulsory proceedings it has always been held by the bankruptcy courts that sections 35 and 39 must be construed together in reference to suits brought by an assignee to recover from a creditor a fraudulent preference. The amended section 39 provides that the assignee may recover the preferred payment if the creditor had reasonable cause to believe the debtor insolvent and knew that a fraud on the act was intended. But this provision of the amended section only applies to cases of involuntary bankruptcy, begun since December 1, 1873.

So that, in the present case, the provisions of section 39 as amended, in regard to knowledge on the part of the creditor, have no application and the Bankrupt Act would be inconsistent with itself if section 35 as amended should be construed to apply to involuntary cases begun before December 1, 1873, which is this case. It is plain enough that Congress meant, in the amendments to section 39, to say that in involuntary cases the assignee might recover the property transferred only when the creditor had the actual knowledge prescribed, when the bankruptcy proceedings were begun after December 1, 1873. In cases arising before that date it would be directly opposed to the expressed will of the legislature, it seems to me, to apply the new rule of evidence touching knowledge on the part of the creditors, or to give to the amendments to section 35, in this particular, any greater retrospective force than the legislature had given to the similar provision of section 39.

There is another provision of law which seems to have a direct bearing upon this question.

It is section 4 of an act entitled "An act prescribing the form of the enacting and repealing clauses of acts and resolutions of Congress and rules for the construction thereof," (16 Stat. 431), now section 13 of Revised Statutes, and reads

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as follows: "The repeal of any statute shall not have the effect to release or extinguish any *penalty, forfeiture or liability* incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Now, I do not think it can be doubted that a creditor who had received property from his debtor before June, 1874, and under such circumstances that it would be held an unlawful preference under the old section 35, had "incurred" a "liability" under the act to refund it to the assignee of the debtor, which could be enforced by a proper action. If so, there being no express provision in the repealing act extinguishing this liability, the conclusion is irresistible that it still exists, and that the repealed statute is still in force for the purpose of sustaining any proper action to enforce the liability. Whether the amendment requiring proof of actual knowledge, where before proof of reasonable cause to believe was sufficient, is important or merely verbal, is a question upon which very learned judges have differed. In the view I have taken of the other points raised by this demurrer it is unnecessary to decide that question, for whether material or not, it has been held that the amendment does not affect the transactions out of which this suit arises.

Demurrer overruled.

[THE SHIP GARNET.]

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JUNE 8, 1875.

1. RIGHT OF MASTER TO DISCHARGE SEAMAN FOR MISCONDUCT.—Where the first mate of a ship, before leaving the home port, became so intoxicated as to be disobedient, insolent to the master, and negligent in his duty: *Held*, That the master was justified in discharging him, while in the home port, for that one offense.

Before HILLYER, District Judge.

Libel to recover damages for an unlawful discharge.

D. T. Sullivan and James Crittenden, for libellant.*Andros & Page*, for claimants.

HILLYER, J. The libellant shipped on board the *Garnet* on Friday, April 2, as chief officer, at fifty dollars per month. On Saturday the *Garnet*, then lying at her wharf, was hauled off into the stream. On that day, before the beginning of the voyage, the incidents which led to the libellant's discharge happened, and the first question is, whether the conduct of the first mate was such as justified his discharge, he having been discharged by the master on Monday, the fifth of April; for if the discharge was right the libellant has no case, and the consideration of the other questions is needless.

Making due allowance for the quality of some of the evidence given by the seaman on behalf of the claimant—the contradictions in their statements, being mostly on points not essential—enough appears by a very decided preponderance of evidence to show that the libellant, on Saturday, was so much under the influence of liquor that he was stupid and unfit for duty.

Before the conclusion of the argument this was admitted by libellant's counsel. When the ship hauled off, the master, owing to the mate's condition, was obliged to do much of his duty. When left that afternoon in charge of the ship he omitted many things which it was his duty to

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do, and in the evening when ordered by the master to go down and stow the provisions out of the water, which was leaking from a water cask, he refused to go, saying the provisions were all right. He was also guilty of using foul and disrespectful language to the master.

Admitting the mate's drunkenness, counsel for libellant argue that the neglect of duty, disobedience and disrespect were caused by the mate's taking too much liquor, and that for this single offense the master may not lawfully discharge him.

Curtis says that the spirit of the English and American tribunals has been not to assign specific offenses for which a mariner, under all circumstances may be discharged; but it is laid down, generally, that the master may discharge for a legal cause, not for slight or nominal causes, and certainly not for a single offense, unless of a very aggravated character, thus leaving the master's justification to depend upon the degree and nature of the mariner's misconduct, under all the circumstances of the case. The station of the party and the nature of his duty are always to be kept in view. (*Rights and Duties of Merchant Seamen*, 149-50.)

Thus the dismissal of a cook or steward, when found incapable from drunkenness, may be ratified with more latitude than that of mariners. (*Black v. Ship Louisiana*, 2 Pet. Ad. R. 268.)

In deciding upon the legality of this discharge, then, the fact that the libellant was chief officer must be kept in view; also that he was discharged before the beginning of the voyage and in a home port. That there is an important distinction between a discharge in the home port before the voyage has commenced, and one afterward in a foreign port, before the termination of the voyage, is, I think, perfectly plain to every mind. Clearly, when it appeared that a mariner, after weeks or months of faithful service, had been discharged and his wages claimed to be forfeited, the courts would require proof of more aggravated misconduct than when the seaman had been discharged in his home port before the voyage had begun. But in this case the misconduct happened on the day after the libellant shipped, before

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the voyage had begun, and before two days' wages had been earned. True, the contract had been made and the master was bound to fulfill it, unless the misconduct of the mate was such, as under the circumstances, justified the master in discharging him.

The office of first mate is the second in importance on board a ship. During the absence of the captain or his inability from sickness, his duties devolve on his mate, and the importance of having a sober, faithful and competent man in this place can hardly be exaggerated. The lives and property on board may all be dependent upon his skill and competency. What is said in the cases tending to establish the doctrine that a seaman ought not to be discharged for one act of drunkenness, disobedience or neglect of duty, it seems to me is not applicable to the case at bar. In those cases the seaman had been discharged in a foreign port after long and generally faithful service, and the language of the courts should be read in the light of the facts of the case in which it was used. The present is very different from such cases.

On Saturday, the master left the ship in charge of the libellant, and was absent about three hours. On his return he finds the libellant stupid through liquor, the ship in disorder and the provisions uncared for. His remonstrances, his inquiries and his censure are met by insolence and foul language and his orders with disobedience. No court, I think, can say that under these circumstances the master was bound to go to sea with a chief officer who made such a beginning as this, and wait for another act of drunkenness or disobedience; or to try any experiments with a man who at the outset displayed the character this man did, while he would at the same time be risking the safety of the ship, its cargo and crew. On the contrary, he would have failed in his duty to the owners and to all the interests intrusted to him had he allowed the libellant to remain as chief officer, and commenced the voyage with him. Courts of Admiralty, says Judge Lowell, are not very severe with seamen who happen to get drunk once or twice, especially if they are off duty. But the first officer has a much

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Points decided.

higher responsibility than the crew and must be proportionally careful in his conduct; and if he fails when left in command the master is justified in visiting such an offense with a severe punishment. (The *Eldorado*, 1 Low., 289.) In that case the mate's discharge in Liverpool, a foreign port, was justified because he got drunk when left in charge of the ship.

I consider the master of the ship *Garnet* legally justifiable for the discharge of the libellant.

The libel, therefore, is dismissed with costs.

MARY AGNES SEAVERNS ET AL. v. HENRY GERKE
ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 10, 1875.

1. ADMINISTRATOR'S SALE BY AUTHORITY OF ALCALDE. — A sale of lands in the Sacramento District in 1849 made by John Bidwell in the assumed character of administrator, upon authority to settle the estate of a deceased person given by Alcalde, Schoolcraft, upon a verbal application, no judicial record of the proceeding having been shown, held to be void.
2. GUARDIAN — APPOINTMENT WITHOUT NOTICE VOID. — Under the act of 1850, authorizing the appointment of guardians for non-resident minors having estates within the State, "after notice given to all persons interested in such manner as the judge shall order," an appointment of guardian without giving any notice whatever is void.
3. RECORD MUST SHOW JURISDICTION. — In such case the record must affirmatively show that every act essential to give jurisdiction to make the appointment has been performed, or the appointment will be void.
4. GUARDIAN'S SALE — WHEN VOID. — Where the appointment of a guardian is void by reason of its having been made without first acquiring jurisdiction by giving the notice required by the statute, all subsequent proceedings, including the sale of the ward's estate, are void.
5. STATUTORY CONFIRMATION OF VOID SALE. — The statute of 1866, making valid all sales under orders of the Probate Court, where there have been "defects of form, or omissions, or errors," does not validate sales made where no jurisdiction to act at all has been acquired. It was only intended to embrace cases where defects, omissions or errors have arisen in the course of the exercise of jurisdiction already acquired.

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6. SAME.—If otherwise, the act itself is void for want of constitutional power in the Legislature by a legislative act to arbitrarily transfer the property of one party to another.

Before SAWYER, Circuit Judge.

Bill in equity to determine an adverse claim and remove a cloud upon the title of complainants to certain lands.

In 1844 the Governor of California granted to Edward A. Farwell five leagues of land. In 1845 said Farwell conveyed to James and John Williams the north half of said tract. In or about the month of December, 1845, said Farwell died intestate, seised of such interest in the south half of said tract, being the premises in question, as he acquired under said grant. He left surviving him, residing in some of the Eastern States, a mother, four brothers and one sister, he having at the time neither wife nor children. His said sister, named Lydia Jane Farwell, afterwards in 1851, inter-married with George W. Seaverns. The complainants are the offspring of this marriage, Mary A. Seaverns having been born May 10, 1853, and George H. Seaverns, May 28, 1854. Mrs. Farwell, the mother of said Edward A. Farwell, died intestate in 1852, leaving the said four sons and Lydia Jane, mother of complainants, her heirs at law. On June 14, 1855, said Lydia Jane died intestate, leaving her surviving the said husband George W. and her children, Mary A. and George H. Seaverns, the complainants in this case, who thus inherited from their said mother two fifteenths of all the premises in question, unless the title of the latter was cut off before coming to them by a sale, hereinafter mentioned, made by John Bidwell, October 25, 1849, in the assumed character of administrator of the estate of said Edward A. Farwell. Neither the complainants nor any of said heirs of Edward A. Farwell were ever in the State of California.

Prior to and during the year 1849, there was an extensive district of country, including the premises in question, recognized by the people as, and called, the Sacramento District, within which officers, called alcaldes, chief magis-

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trates, and judges of courts of first instance, residing at Sacramento, assumed to act in a judicial character, exercising both civil and criminal jurisdiction. Their acts were generally recognized by the people of the district. At the time of the transfer of California to the United States, Captain John A. Sutter was judge of the court of first instance, in said district, acting under appointment by the Mexican authorities. Subsequent to that time, down to the Spring of 1849, these officers were appointed by the United States military commanders in California acting as governors. During the latter part of 1848 and early part of 1849, one Dr. Bates, by virtue of an appointment by Colonel Mason, acted in the capacity of alcalde and judge of the court of first instance until superseded by Henry A. Schoolcraft, who, sometime in the Spring, or early part of 1849, was elected alcalde by the people, at a public meeting held at Sutter's Fort. By authority conferred by this election, and, so far as appears, without any appointment by the military commander, or acting governor, or otherwise conferred, he assumed to act as alcalde, judge of the court of first instance, and recorder of conveyances, till about the second of August, 1849, when he was succeeded by judge Thomas, who acted under an appointment by General Riley, military governor of California, till the establishment of the State government under the present constitution. At the time of his death, Edward A. Farwell was indebted to John Bidwell, and to sundry other parties in various sums. Bidwell, sometime in the Summer or Fall of 1849, applied to said Schoolcraft for authority to settle up the estate of said Farwell, deceased, and, as Bidwell testifies, authority was given him. But the terms of the authority are not given, otherwise than that, as Bidwell testifies, he followed the directions of Schoolcraft. The date of this application is not very clearly fixed. The most definite testimony on this point is, that the application was made and authority given on the same day upon which Bidwell prepared the notice of sale of the property of the deceased, which notice bears date August 22, 1849. If this is the proper date, it must have been after Schoolcraft ceased to be alcalde, as his suc-

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cessor's records date from August 2, 1849. But it will be assumed that it was while Schoolcraft was still acting. The application for authority to administer on the estate was verbally made in person by Bidwell, no written application or petition being filed, and the authority given by Schoolcraft seems, also, to have been verbal. At all events, there is no evidence sufficient to show that any order in writing, or any record of the transaction was ever made. The application was made, authority given, and the notice of sale of lands prepared, all at the same time, without any kind of notice to the parties interested, or, so far as shown, any record whatever of the proceedings. The notice of sale published, simply states that the estate of Edward A. Farwell, deceased, will be sold at Sacramento, October 25, 1849, giving a general description of the property, without any reference to any order of court, or authority of any kind, other than the signature, which is, "John Bidwell, administrator." The notice was published in the *Placer Times* weekly from August 25 to October 20, and the sale took place October 25 to John Potter for \$1250. The deed to Potter makes no reference to the notice of sale, or authority of Bidwell, other than it purports to be made "between John Bidwell, administrator of the estate of Edward A. Farwell and John Potter;" and "the party of the first part bargains, sells and conveys to the party of the second part, all the right and title of the said Edward A. Farwell to" the premises described, and it is signed "John Bidwell, administrator of Edward A. Farwell." It does not appear that any order confirming the sale was ever asked or made. A paper purporting to be an inventory of Farwell's estate, and an appraisement made and sworn to by P. B. Reading and S. J. Hensley, before S. J. Thomas, judge of the Sacramento District, was filed with said Thomas, marked "filed October 27, 1849," but the filing is not attested by the signature of that officer. Mr. Bidwell, the only witness on the point, is not certain by whom, or how, the appraisers were appointed, or whether appointed at all, and there is no record of their appointment. An auctioneer's account of the sale of Farwell's estate is marked filed October 27,

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1849, without being attested by the signature of the officer filing it. On May 11, 1850, the claims against the estate of four several persons, viz.: John Bidwell, Thomas Cummings, Samuel J. Hensley and Talbot H. Green, with vouchers showing payment by Bidwell, were filed in the Probate Court of Sacramento county, established under the State constitution. On the same day, May 11, 1850, there was filed and so marked by the clerk of the said Probate Court, a document purporting to be the final account of said Bidwell. On May 17, 1850, an order was made and entered by said Probate Court, Edward J. Willis, county judge and *ex officio* probate judge, presiding, wherein, after reciting the presentation of Bidwell's account, and that there remained in his hands "a balance of \$2295.20, which account is approved," it was "ordered by the court that the said administrator distribute the said sum among the legal heirs of said deceased equally," without naming them. On the same day a receipt of Tarr & Cone to Bidwell for fifty dollars attorney's fees was filed, and an order was entered by the court allowing said fee. The auctioneer's receipted account was filed November 11, 1850. The foregoing constitute the entire files, and the said two orders entered May 17, 1850, by the Probate Court, the only orders now to be found, or shown by the evidence ever to have been of record in the administration of said estate. Judge Thomas' record from August 2, 1849, is in existence, and shows his court to have been opened and business to have been transacted therein on October 25, 26, 27, 29 and 30, 1849—the day of the sale, and days immediately following—but they show no entry of any kind, relating to this proceeding on either of these days, or on any other day during his incumbency of the office from August 2, 1849, until the end of his term of service. No entry is satisfactorily shown to have ever been made by Schoolcraft, or any paper therein ever presented to, or filed by him. There is some evidence, not very satisfactory, tending to show that Schoolcraft kept a small book in which he sometimes entered minutes of judicial proceedings had before him. But there is no evidence to justify the court in finding that any minutes of these

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proceedings now in question were ever entered, or, if entered, what those entries were.

Section 30 of the act of February 28, 1850, required "the records of the courts of first instance and all books, papers and documents in the custody of such courts, or the clerks thereof, in any way relating to judgments, orders, suits, or any legal proceedings therein" to "be delivered to the county clerk of the county in which is the place of holding the court of first instance immediately after the election and qualification of such clerk," and to be "by him deposited and kept in his office, subject to the order of the District Court." (Stat. 1850, 80, Sec. 30.) Section 33 authorizes the District Court thereafter to proceed in "all suits and proceedings" then pending, the same as if proceedings had been commenced in the District Court. Section 35 makes similar provisions respecting alcaldes' records in matters where the alcalde acted as judge of the court of first instance; and section 38 similar provisions for transferring other records appropriate to alcaldes' courts to justices of the peace elected under the State organization, who were authorized thereafter to proceed with proceedings then pending. But there is no act authorizing the transfer of anything to Probate Courts, or authorizing Probate Courts to proceed and close up any unfinished business of any kind of the alcaldes' courts, or courts of first instance. And section 39 provides for transferring "books of records of deeds, mortgages, powers of attorney and other instruments kept by the alcalde or judge of first instance" to the county clerk. The records of Judge Thomas, Schoolcraft's successor, were transferred under this act. The books and records of Schoolcraft of conveyances, etc., were also transferred as required. And said records so transferred—"the books of records used by Henry A. Schoolcraft for the record of deeds and other instruments in writing, and deposited in the recorder's office in said county (of Sacramento)—were afterwards adopted and recognized as public records by the Legislature of California in the act of May 18, 1853. (Stat. 1853, 227.) But no judicial records were transferred by Schoolcraft as required by the statute before cited, and

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there is no subsequent legislation adopting or recognizing any such judicial records. The State government was organized not many months after Schoolcraft was superseded by Thomas, and whatever the nature of the minutes kept by him, if any were kept, it seems highly improbable that they were worthy of being dignified by the name of judicial records; for they must have been in existence at the organization of the State courts, and, if of any importance, in all probability would have been turned over under the provisions of the statute, as were the records of conveyances kept by him, and the judicial records of Thomas.

On February 18, 1853, James Williams, one of said Farwell's grantees to the north half of said Mexican grant of five leagues, by E. O. Crosby, his attorney "on his own behalf, and in behalf of the heirs and legal representatives of Edward A. Farwell, deceased," presented a petition to the board of land commissioners for a confirmation of said grant. He prays that the grant may be confirmed to himself, "and the heirs and legal representatives of said Edward A. Farwell, the names of all of whom will be given in a supplemental petition hereinafter to be filed," etc. On February 13, 1855, by the same attorney, said James Williams, and a number of other parties named, including the heirs at law of said John Potter, filed a supplemental petition, in which, among other things, they set out the death of Farwell; the action of Bidwell as his administrator; the sale of said south half—the premises in question—to John Potter, and the rights of his heirs therein, etc. The heirs of Farwell are not mentioned by name in the petition. On August 28, 1855, the board of land commissioners confirmed "to the heirs at law of Edward A. Farwell, deceased, the south half of the entire grant," and adjudged that the claim of Potter's heirs to the south half "of the grant is not valid, and it is decreed that the same be rejected." On appeal to the District Court, the decree of the board was affirmed in the same language, and said decree became final, and the land was patented to the heirs at law of said Farwell in 1863, in accordance with said decree. Whatever interest said John Potter acquired through said sale by John Bid-

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well by subsequent conveyances, and prior to the filing of the bill had passed to the defendants in this suit.

Sometime prior to 1860, Henry R. Mighels, a cousin of Edward A. Farrell, residing at the time in California, and a part of the time in Butte county, had some correspondence with the heirs of Farwell upon the subject of the estate left by Edward A. Farrell. In a letter to his father in 1859, seeking to obtain powers of attorney from some of the heirs, he represents their interest as worth at that time \$75,000. He obtained powers from some of them previous to, or early in, 1860, and soon afterward, among other things entered into an agreement with certain attorneys to act for the heirs in recovering their interest, the lands being in the possession of trespassers, and as compensation to give them one-third of the estate; and another agreement with defendant, Gerke, by which he contracted to convey to him all the remainder of the lands to which the title could be assured and possession recovered, at from two to three dollars per acre, and Gerke was to advance him \$2000 to enable him to go East and obtain proper powers from all the heirs to enable him to carry out his contract. He went East as agreed, and obtained powers from the four brothers, and a power of attorney from George W. Seaverns, father of the complainants; but the power of Seaverns in evidence dated April 7, 1861, duly authorizes Mighels to act as his own attorney to convey such interest as he himself had as heir, without making any reference to his children, the complainants. But if there was any other attempt by the father to authorize the sale of complainants' interest in the land, it was necessarily void. Upon his return, instead of carrying out the first contract, after further consultations and negotiations, he entered into a new contract with Gerke, by which the latter was to pay a gross sum of \$6000 for the interest of the heirs. But Mighels was unable to convey the interest of the complainants, who were still minors under ten years of age, and Gerke's attorneys advised him to institute proceedings in the Probate Court to divest their rights. Acting upon this advice, and for the purpose of enabling whatever right, title and interest in said lands was

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vested in complainants to be alienated and divested, said Mighels filed a petition in the Probate Court of Butte county on March 2, 1861, stating generally the facts of the case, and praying to be appointed guardian with authority to take charge of their said estate. Without any notice whatever, or any other proceeding than the filing of said petition, two days afterwards on March 4, 1861, an order was entered in the minutes of the court as follows: "Now comes H. R. Mighels, and files his petition praying to be appointed guardian of Mary Agnes Seaverns, and George Henry Seaverns, heirs at law of the estate of E. A. Farwell, deceased. Whereupon, it is ordered by the court that said petitioner be appointed guardian of the aforesaid minor heirs of E. A. Farwell, deceased, upon his filing his bond," etc. In due time bond was given, a petition for sale was filed, appraisers appointed who appraised the interest of complainants, being two-fifteenths of several leagues of land situate in Butte and Colusa counties, and one square mile in Sutter County, including claims against trespassers for damages, at \$3500. Such proceedings were had that a sale at auction was afterwards made at which the entire interest, consisting of the said three separate and distinct tracts of land, lying in three different counties, were on December 2, 1861, struck off and sold in gross at one bid to defendant, Gerke, for \$100, he being the only bidder; and in pursuance of a subsequent order of the court, the premises were conveyed to Gerke for said sum by said Mighels, and the proceeds remitted to the father of complainants.

J. A. Moultrie, W. H. Laine and F. E. Spencer, for complainant.

O. C. Pratt, R. R. Provines, W. C. Belcher and Sharp & Lloyd, for defendants.

SAWYER, Circuit Judge, after stating the facts. Upon the facts stated, the first question presented, is, as to the effect of the sale by Bidwell, assuming to act as administrator of the estate of Edward A. Farwell, deceased, under authority claimed to have been derived from

Schoolcraft, as alcalde or judge of the court of first instance. It would be going a great way to hold that Schoolcraft could legally exercise any such judicial authority as he is claimed to have exercised in this case, by virtue merely of an election by the people at a public mass meeting held under no existing law, and without any other recognized authority. But, without deciding the question, I shall concede for the purposes of this case, that he was vested with all the authority that alcaldes, appointed by the military governors in the usual way at that time, were authorized to exercise. On this hypothesis, it is claimed by the defendants that the case is within the decision in *Ryder v. Cohn*, 37 Cal. 69, and governed by it. That case, undoubtedly, goes to the uttermost limit of the legal principle invoked by the court to sustain the sale then under consideration. This decision was by a divided court. It fell to my lot to participate in it, and it was after great hesitation that I yielded my concurrence. Without questioning the correctness of that decision, it would, in my judgment, be necessary to go far beyond it to sustain the sale by Bidwell now in question. In that case the proceedings were of the most formal character, and there was a complete formal record of every step in the proceedings, from the beginning to the end, except that it did not affirmatively appear that any notice of the application was given; but the court held that under the decision in *Hahn v. Kelly*, 34 Cal. 391, the court being one of general jurisdiction, all presumptions were conclusively in favor of the record, and that its judgments would be upheld on a collateral attack, if tested by the strict rules of the common law. Besides, the record shows that "Edward Norton, Esq., appeared as and was attorney for the absent heirs," who were adults (37 Cal. 77). In this case there is nothing in the semblance of a record. No application was ever filed; no record of any order or action of the court is produced, and none is shown to have ever existed. The only two orders of which there is any evidence of their having ever existed in writing, are the orders approving the account of Bidwell and allowing an attorney's fee of \$50, entered by the Probate Court on

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May 17, 1850. The authority of that court was wholly derived from the probate act of the State of California, which, as has long been settled, had no application to the estates of persons who died before the passage of that act. (*Grimes v. Norris*, 6 Cal. 624; *Tevie v. Pitcher*, 10 Cal. 465; *De la Guerra v. Packard*, 17 Cal. 193; *Soto v. Kroder*, 19 Cal. 97; *Downer v. Smith*, 24 Cal. 114; *People v. Senter*, 28 Cal. 502; *Wilson v. Castro*, 31 Cal. 420; and *Coppinger v. Rice*, 33 Cal. 408.) Besides, as will be seen by referring to the statement of facts, the statute of Feb. 28, 1850, expressly conferred authority to proceed in "all cases and proceedings" pending before alcaldes and courts of the first instance, at the date of the transfers of the records of the State courts, upon the District Courts and justices of the peace, and not upon Probate Courts.

The only written evidence of any act performed in the case by either of the alcaldes or judges of the court of first instance, acting during the progress of the proceedings—the only courts having any jurisdiction in the matter—shown to have ever existed, is the taking and certifying by Judge Thomas of the oaths of Hensley and Reading to the appraisal, Oct. 25, 1859, and marking that document filed Oct. 27; and on the latter day marking filed the auctioneer's report of sale; and neither of these filing marks is attested by the signature of the officer. To sustain a forced sale of large landed estates of absent heirs under judicial proceedings so loosely conducted, and of which there does not appear to have been any record, or other written evidence, would be going beyond any authority or legal principle brought to the notice of the court; and further, I think, than any court having a due regard for the safety of private rights, would be justified in going. Besides, the heirs of John Potter presented themselves as claimants in the supplemental petition for the confirmation of the Mexican grant made to Farwell, and set out their title derived by the sale by Bidwell as the basis of their claim. Thus, in a proceeding to which they were parties seeking for themselves confirmation of the grant, their claim to the land, based upon this same title, was rejected, and the adverse claim of Far-

well's heirs confirmed, and the lands patented to said heirs in accordance with the decree of confirmation. If Potter's heirs or their successors in interest should file a bill against the heirs of Farwell, as patentee, to charge them as trustees and seek a conveyance of the legal title, I apprehend that no court would grant the relief upon the evidence as presented in this case. If not, the same evidence and state of facts ought not to constitute a valid defense to the present bill.

2. The next question is, as to the validity of the sale of complainant's interest in the premises by Mighels as guardian, which is earnestly and confidently assailed on various grounds. The first ground is, that Mighels never was legally appointed guardian, the court never having acquired jurisdiction to appoint a guardian for want of notice. The act relating to guardians, in force at the time of the appointment of Mighels as guardian for complainants, so far as relates to this case, provided that the "probate judge of each county, when it shall appear to him necessary or convenient, may appoint guardians to minors * * * who shall reside without the State and have any estate within the county." (Stat. 1850, 268, sec. 1.) Section 43 of the same act is as follows: "When any minor or other person liable to be put under guardianship, according to the provisions of this act, shall reside without the State, and shall have any estate therein, any friend of such person, or any one interested in the estate in expectancy or otherwise, may apply to the probate judge of any county in which there may be any estate of such absent person, and after notice given to all persons interested, in such manner as the judge shall order, and after a full hearing and examination, if it shall appear to him proper, he may appoint a guardian for such person." (Id. 272.)

Under this section the authority to appoint a guardian is "after notice is given to all persons interested, in such manner as the judge shall order." In this case, as in all actions where the rights of parties are to be affected by judicial proceedings, the fundamental condition of authority to act at all is to first acquire jurisdiction of the persons whose

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rights of property are to be affected, by giving them notice of the proceeding. Until the party to be affected has legal notice, the court has no jurisdiction whatever to act, and all proceedings without notice are without authority and absolutely void for want of jurisdiction. In *Gronfier v. Puymiro*, 19 Cal. 629, the question was as to the sufficiency, not the want, of the notice. There was notice given by publication in accordance with the order of the judge, and it was held that the time and manner of the notice, under the express provisions of the statute to that effect, were within the discretion of the judge; but it was not intimated that the judge could acquire jurisdiction without any notice. Besides, some importance seems to have been attached to the fact that the attack was made by third persons in a collateral way, and not by the minor. The court say "third persons cannot question the validity of the order upon any allegation that insufficient notice was given of the hearing of the application for the appointment under the statute." (Id. 632.) But in this case there does not appear to have been any notice whatever, and the record of what did take place seems in all respects to be very formal and complete. There is no recital of notice. The appointment was made two days after filing the petition, and only recites the filing of the petition as the basis of the appointment. But notice is essential to give jurisdiction, for the appointment is only to be made "after notice given to all persons interested." The person whose estate is to be divested by some one who voluntarily assumes to intermeddle, is, certainly, a "person interested," and under the statute is entitled to some notice, even though the kind and manner of it is left to the discretion of the judge. In the language of Mr. Justice Field, in *Galpin v. Page*, ante, 126—a case where publication in a prescribed form was authorized: "Where personal service cannot be made by reason of the non-residence in the State or absence of the infant, service must be made by publication, as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant." So, in this case, "notice given to the persons interested"—the infants whose estates in many leagues of land are sought to be divested for the purpose of

perfecting a contract of sale already made without legal authority, "in such manner as the judge shall order," "is the prescribed condition to the exercise of jurisdiction over the infant." This proceeding is in no sense in the nature of a proceeding *in rem*, like that in *Grignon's Lessees v. Astor* (2 How. 319), and in that case letters of administration had been "duly granted and jurisdiction acquired." It is not sought in case of this guardian sale to apply property in the jurisdiction of the court to the payment of the debts of the infants for which it was liable. The whole object is, to divest the title of the infants by a stranger, on the pretense that it is for their benefit. There certainly should be notice of some sort, as the basis of jurisdiction, and this the statute requires.

Under the statute placing the proceedings of the Probate Courts upon the same footing as Superior Courts of general jurisdiction, and the decision of the Supreme Court of California in *Hahn v. Kelly*, 34 Cal. 391, conceding that I might have felt authorized to sustain the appointment of a guardian on the doctrine of presumptions recognized in that case, the Supreme Court of the United States in *Galpin v. Page* 18 Wal., 350, and Mr. Justice Field in the same case on retrial (*ante*, 94), have overruled that case and distinctly held that, where the parties to be affected reside out of the jurisdiction of the court, the record must affirmatively show that every step necessary to give jurisdiction has been regularly taken, otherwise the proceedings are utterly void. That case was in all essential particulars in principle similar to this. The infant, a posthumous child of tender age, was a defendant in an action to settle an alleged partnership of her deceased father, one of whose heirs she was. An attempt to procure service by publication of summons upon her and her mother, with whom she lived in the state of New York, was made. Notice in some form actually reached the mother, with whom she resided, as she appeared and defended. The notice to the infant, in point of fact, was practically all that could be accomplished; for the same attorney who appeared for the mother, and, doubtless, at her suggestion and with her approval, was ap-

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pointed guardian *ad litem* by the court, answered and defended the same as the mother. Besides, her interests and those of the mother were precisely the same, and not adverse. The same defense was actually made, and undoubtedly by the same guardian *ad litem* that it would have been made by had the publication been made in strict accordance with the provisions of the statute. Yet the Supreme Court of the United States held that the appointment of guardian *ad litem*, without the record showing affirmatively that the service had been made in strict accordance with the provisions of the statute, was utterly void, and, consequently, that all subsequent proceedings were void. In the present case the proceedings were instituted by a stranger, upon advice of counsel of an adverse party, ostensibly, it is true, and it may perhaps have really been, in the interest of the infants, but for the express purpose of divesting their title to lands. They were entitled to notice so that an opportunity might be furnished to ascertain whether for their interest or not, and to oppose it if deemed expedient so to do. And the statute in this case, as in the other, imposes notice in some manner as a condition precedent to the appointment—as an essential prerequisite to the attaching of jurisdiction to act in the case. In my judgment it is impossible to distinguish this case from *Galpin v. Page*. If there is anything to the contrary in the prior decisions of the same court it must be regarded as overruled. This decision is of course conclusive upon this court. I feel bound, therefore, to hold the appointment of guardian to be void for want of the notice prescribed by the statute, and that the court never acquired jurisdiction to affect the rights of complainants in the proceedings had. The appointment of Mighels guardian being void on the grounds indicated, and this appointment being the basis of the subsequent proceedings, authorities to show that all subsequent action must necessarily be void, do not seem to be required. Yet authorities on the exact point are not wanting. (*Frederick v. Paquette*, 19 Wis., 541; see also, *Galpin v. Page*, before cited.)

3. It is next claimed by defendants that if the guardian's sale is void in consequence of the defects in the proceed-

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ing, it is rendered valid by the provisions of the "Act in relation to probate sales" of 1866. (Stat. 1865-6, 824.) Section 1 of said act is as follows: "In all cases where real estate has been sold in this State under the order of the Probate Courts of the several counties to purchasers in good faith, for a valuable consideration, and defects of form, or omissions, or errors exist in any of the proceedings, such sales are hereby ratified, confirmed, and made valid and sufficient in law to transfer the title to the property sold; *provided*, however, that this act shall not affect in any manner rights acquired prior to its passage, by vendees, grantees, or mortgagees, who claim interests in or liens upon such property under heirs or devisees adversely to such probate sales, nor to sanction in any manner cases of actual fraud."

There is something more in the probate proceedings under consideration than a defect of form or mere errors. There is a failure to acquire jurisdiction of the parties whose interests are to be affected—a failure of authority to act at all. This is, it is true, the result of an "omission" to give notice; but it is hardly to be supposed that the Legislature contemplated such an omission. The term doubtless refers to omissions in the acts to be performed in the exercise of a jurisdiction, which has once attached, and not omissions of acts essential to give jurisdiction to act at all. If the act was intended to include the latter, then it must be void as to such matters. Before the passage of the act, the proceedings, as we have seen, were utterly void for want of jurisdiction. The rights of the complainants were as much unaffected by the proceedings as if they had never been taken. If then, they became valid by the passage of this act, the title has passed from the complainants to the defendants by virtue of the provisions of the act. That is to say, the Legislature has arbitrarily transferred the property of the complainants to the defendants. I suppose it will not be seriously contended that the Legislature, by passing a law declaring that the property of A., by virtue thereof, shall be transferred to and vested in B., can transfer the property of one private

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party to another. That such an act would be unconstitutional, it seems to me, requires no argument to establish; yet such substantially would be the result if the act in question has the effect claimed.

There are other formidable objections to the validity of the proceedings upon which defendants rely, but it will be unnecessary to consider them, as those already decided dispose of the case.

There must be a decree for the complainants as to an undivided two-fifteenths of the premises in question, in pursuance of the prayer of the bill, with costs, and it is so ordered.

THEODORE LEROY v. TOBIAS B. JAMISON ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 23, 1875.

1. **AUTHORITY OF COMMISSIONER OF THE GENERAL LAND OFFICE.**—Previous to the act of June 14, 1860, vesting jurisdiction in the District Court of the United States for California, over surveys of confirmed Mexican land claims, the commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land, and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836, reorganizing the general land office. It embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. This authority continues under the act of 1864. By the act of 1860, and so long as that act was in force, his power in this respect was withdrawn. That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing patents thereon. The course of procedure in such cases stated.
2. **FINAL SURVEY OF MEXICAN LAND GRANT — PUBLICATION OF NOTICE.**—To render a survey final under the act of 1860, when not submitted to the District Court, it was necessary that the publication required should be made, and though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the Surveyor-General was only *prima facie* evidence of the fact.

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3. "PLACE OF PUBLICATION DEFINED." — By the language: "*place of publication*" in the statute of 1860, requiring the Surveyor-General to give notices of surveys made by him by publication once a week for four weeks in two newspapers, one of which was to be in a paper where the "*place of publication*" was nearest to the land, reference is had to the place where the paper is first issued; that is, given to the public for circulation, and not to the place where the paper is subsequently distributed.
4. NOTICE—WHAT IT MUST STATE.—A notice published by the Surveyor-General that he had examined and approved, under the act of 1860, of a particular rancho confirmed to designated parties, is not a compliance with the law requiring publication of notice that he had caused a survey and plat to be made of — land confirmed; or had approved of one made by others under his direction.
5. CLERK'S CERTIFICATE—OF WHAT EVIDENCE.—The clerk of the United States District Court can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases. His certificate is not evidence of any other facts stated therein.
6. COMMISSIONER'S DECISION—EFFECT OF. — The determination of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, as to the regularity and sufficiency of the alleged publication is conclusive, unless reviewed and corrected on appeal by the Secretary of the Interior. The right of the commissioner, upon proper application, to reconsider any matter previously determined by him, must be exercised before proceedings upon the original ruling have been taken and concluded.
7. ACCEPTANCE OF PATENT. — No one can be compelled by the government to become a purchaser, or even to take a gift. In order that the patent of the government may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. The acceptance by the grantee of the conveyance, where no personal obligation is imposed, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance.
8. PATENT, WHEN IN CONDITION FOR ACCEPTANCE.—The deed of the government, that is its patent, is in a condition for acceptance when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. The record stands in the place of the offer of delivery in the case of a private deed; the instrument is thenceforth held for the grantee.
9. OFFICERS' POWERS CEASE WITH RECORD OF THE PATENT.—With the record of the patent the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office, or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowl-

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edge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

10. WHEN PRIOR APPLICATION FOR PATENT EVIDENCE OF ACCEPTANCE.—A previous application for a patent is evidence of its acceptance if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851, and when a patent is issued in conformity with proceedings regularly taken under the act, it takes effect without reference to any subsequent action of the patentee. But if the patent be issued without a final survey conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.
11. ACCEPTANCE OF PATENT WAIVER OF OBJECTIONS.—Objections by the patentee to the survey of a confirmed Mexican land claim are waived by his acceptance of the patent.

Before Mr. Justice FIELD.

This was an action to recover the possession of certain real property in the county of Santa Barbara, and by stipulation, was tried by the court without the intervention of a jury. Both parties claimed the demanded premises under patents of the United States, issued upon the confirmation of grants of the former Mexican government. Both patents covered the demanded premises. The patent under which the plaintiff claimed bears date in March, 1870, and the grant upon which it is founded was made in March, 1840. The patent under which the defendants claimed bears date in October, 1873, and the grant upon which it rests was issued in December, 1844. The plaintiff, having the earlier patent and the elder grant, was entitled to recover, unless the validity of the patent, or the correctness of the survey of the premises covered by it was successfully assailed. The defendants contended that the patent was invalid and that the survey was incorrect.

In support of their position that the patent was invalid, they produced the opinion and decision of Commissioner Drummond, of the general land office, made in June, 1872, directing a cancellation of the patent, and the decision of

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the Secretary of the Interior, affirming his action. The following is Commissioner Drummond's opinion:

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
"WASHINGTON, D. C., June 12, 1872.

"SIR: I have carefully examined the papers in the case of the rancho Guadalupe, Diego Olivera and Teodore Arelanes confirnees, granted by Juan B. Alvarado, March 21, 1840, confirmed by the board of land commissioners for California, December 6, 1853, and by the United States District Court, September 25, 1855, and appeal dismissed February 5, 1857.

"Under instructions dated January 15, 1858, from J. W. Mandeville, United States Surveyor-General for California, United States Deputy Surveyor Brice M. Henry made a survey of this rancho; but, a protest against said survey having been filed July 6, 1859, by Diego Olivera, it was set aside and a re-survey ordered, which re-survey, containing 32,408.03 acres, was made in September, 1860, by United States Deputy Surveyor J. E. Terrell, and the survey and plat approved by Surveyor-General Mandeville on the twenty-ninth of January, 1861. This survey was, on the thirty-first of May, 1861, certified by said surveyor-general to have been published, for four successive weeks in the *Santa Barbara Gazette*, the first publication being on the fourteenth of February, 1861, and the last on the seventh of March, 1861; and also in the *Los Angeles Star*, the first publication being on the twenty-third of February, 1861, and the last on the sixteenth of March of the same year, the form of said publication being as follows, as shown by a copy certified, in 1870, by United States Surveyor-General Sherman Day:

"UNITED STATES SURVEYOR-GENERAL'S OFFICE,
"SAN FRANCISCO, February 12, 1861.

"In compliance with the first section of an act of Congress approved June 14, 1860, regulating surveys of private land claims, surveyed in pursuance of the thirteenth section of an act entitled "An act to ascertain and settle private land claims in the State of California," approved March 3, 1851, have been examined and approved by me.

"Name of rancho, Guadalupe.

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"Confirnee, Diego Olivera *et al.*

"The plats will be retained in this office subject to inspection for four weeks from the date of this publication.

"JAMES W. MANDEVILLE,

"United States Surveyor-General.

"On the twenty-third of May, 1863, John W. Wheeler, clerk of the United States District Court for the southern district of California, certified 'that due notice by publication, in manner and form as required by law, has been made by the surveyor-general of the United States for the State of California, in the matter of the approved survey of the lands called 'Guadalupe,' confirmed to the claimant in the above-entitled cause of *Diego Olivera et al. v. The United States;*' and 'that the full period of six months from and after the completion of said publication has elapsed, and no objections having been made thereto or filed in my office, the said approved survey has become final, and the claimant therefore entitled to a patent for the land therein contained.' In the same year E. F. Beale, then United States surveyor-general for California, transmitted to this office a copy, duly certified, May 25, 1863, of the plat, field-notes, and other documents in the case, as a basis for the issue of a patent, and in those papers the surveyor-general, after stating that the rancho under consideration had been surveyed in conformity with the grant and decree of confirmation; continues as follows:

"I do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by J. E. Terrell, deputy surveyor, in the month of September, 1860, under the direction of this office, which, having been examined and approved, are now on file therein. And I do further certify that in accordance with the provisions of the act of Congress approved on the fourteenth day of June, 1860, entitled 'An act to define and regulate the jurisdiction of the District Courts of the United States in California in regard to the survey and location of confirmed private land claims,' I have caused to be published once a week, for four weeks successively, in two newspapers, to-wit, the *Santa Barbara Gazette*, published in the county of Santa Barbara, being the newspaper published nearest to where the said claim is located, the first publication being on the fourteenth day of February, 1861, and the last on the seventeenth day of March, 1861; also, in the *Los Angeles Star*,

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a newspaper published in the city and county of Los Angeles, the first publication being on the twenty-third day of February, 1861, and the last on the sixteenth day of March, 1861, a notice that the said claim had been surveyed, and a plat made thereof and approved by me. And I do further certify that the said approved plat and survey was retained in this office during all of said four weeks, and until the expiration thereof, subject to inspection. And I do further certify that no order for the return thereof to the United States District Court has been served upon me. And I do further certify that, under and by virtue of the said confirmation, survey, decree and publication, the said Diego Olivera *et al* are entitled to a patent from the United States upon the presentation thereof to the general land office for the said tract of land bounded and described as follows, to-wit: (Here follows the field-notes of the Terrell survey.)

“It appears from the foregoing that the rancho Guadalupe was properly and finally confirmed, and that it was surveyed by Henry, objected to, and re-surveyed by Terrell in September, 1860. Surveyors-General Mandeville and Beale certify that the plat and field-notes thereof were approved in January, 1861, and duly published, according to law, in the months of February and March of the same year in the *Santa Barbara Gazette* and the *Los Angeles Star*; and the clerk of the United States District Court for Southern California certifies, in his official capacity, that all the requisites of the law had been complied with, and that the survey of the rancho Guadalupe was final by publication under the act of 1860.

“So far, therefore, as the official records of the surveyor-general's office and courts show, the survey was final. It was so considered by this office, and a patent in accordance therewith, dated June 30, 1866, was prepared, signed and recorded, and sent to the United States surveyor-general for California on the second of August, 1866; but said patent was never delivered, the then owner of the rancho, John B. Ward, refusing to accept the same, alleging that the Terrell survey did not conform to the decree of confirmation, and also that it was not final under the act of June 14, 1869, (12 Stat., p. 33), the requirements of that act with respect to publication never having been complied with. In this protest Mr. Ward alleges that ‘on the twenty-ninth day of January, 1861, the said surveyor-general filed in his

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said office an approval of the field-notes and plat of the said rancho, and that subsequently to such filing no publication of the notice of the approval was made in accordance with the provisions of the act of Congress of June 14, 1860, already recited.' 'That it is true that a notice of the approval of a plat of survey of a certain tract of land, known by the name of Guadalupe, was published in the *Los Angeles Star*, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the *Pacific Sentinel*, the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860; but the field-notes and plat of the rancho, which is the subject of the present memorial, not having been approved until the twenty-ninth of January, 1861, the publication above referred to could have had no application thereto, so that, in point of fact, no publication of the approval by the surveyor-general of the field-notes and plat of the survey of the Guadalupe rancho, granted to Diego Olivera and Theodore Arellanes, has ever been made according to law.'

"In support of these allegations, there were filed three affidavits:

"First. An affidavit signed by John Nugent, one of Mr. Ward's counsel, in which it is stated that up to July, 1866, no other plat of the Guadalupe was ever exhibited or on file as the official plat approved by J. W. Mandeville, except one with the following inscription:

"NOTE.—A notice of the approval of this plat of survey has been published in accordance with the act of Congress of June 15, 1860, in the *Los Angeles Star*, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the paper nearest the land, being the *Pacific Sentinel*, the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860. This plat has remained in this office subject to inspection from the date of the approval thereof.

"Second. An affidavit signed by Vicente A. Torras, who was employed on the *Santa Barbara Gazette*, in January and February, 1861, and who swears that in those months said paper was published in San Francisco.

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"Third. An affidavit, signed by S. B. Brinkerhoff, in which it is stated that said affiant 'was a subscriber to a paper known as the *Santa Barbara Gazette*, and that of his own knowledge the place of publication of said paper was in the city of San Francisco, and not in the county of Santa Barbara.'

"Upon these affidavits, this office decided, in letter dated October 22, 1866, addressed to the United States surveyor-general for California, that the publication was not in conformity with the law of 1860, and was, therefore, void. A new survey was ordered, made, and subsequently published under the act of 1864, approved by the commissioner of the general land office, and patent issued in accordance therewith, which patent was sent to the surveyor-general's office, but recalled before delivery.

"Although two witnesses, Torras and Brinkerhoff, swear positively that the *Santa Barbara Gazette* was, in February and March, 1861, published in San Francisco, Doña Longina Yriarte de Torras, widow of V. I. Torras, one of the publishers in 1861 of the *Santa Barbara Gazette*, swears that from January 1 to October 17, 1861, said paper was printed at San Francisco, and as soon as printed sent to Santa Barbara for distribution; and M. W. Kimberly testified that during the years 1860 and 1861, there was no paper published in Santa Barbara county, except the *Santa Barbara Gazette*. There is also filed with these affidavits a copy of said paper, headed as follows: "*Santa Barbara Gazette. Organo de la Poblacion Española en California. Santa Barbara, Jueves, 17 de Octubre de 1861.*" It would seem, therefore, that said paper was printed at San Francisco, but distributed at Santa Barbara, and that Torras and Brinkerhoff must be understood as testifying in effect that in their opinion the place of printing and publication must be identical. With their conclusions, which seem to have materially affected the opinion of this office when the publication of the Terrell survey was rejected, I cannot agree. The paper on its face purports to be published at Santa Barbara, and it was first circulated in that county, and in my opinion a decision from these facts that said paper was published

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at San Francisco cannot be reached by an interpretation of the word "published" in accordance with its usual and ordinary meaning, nor in accordance with the proper interpretation of the word, as used in the act of June 14, 1860. The design of the publication prescribed by the act of 1860, was to convey to parties in interest notice that their claims had been surveyed, and to afford them an opportunity to file objections and contest said surveys; and that object was as well, if not better, accomplished by a publication in the manner stated than it could have been in any other manner under the peculiar circumstances surrounding the case. That would be sufficient to satisfy the requirements of the spirit of the law, but in my opinion the proceedings in the matter were also in strict conformity with the letter of the act of 1860. In Worcester's Dictionary, 'publication' is defined as 'the act of publishing or making public,' etc.; in Webster's Dictionary the same word is defined as 'the act of publishing or making known; notification to the people at large, either by words, writing, or printing;' in Bouvier's Law Dictionary 'publication' is defined as 'the act by which a thing is made public,' and 'publisher' as 'one who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers;' and the same authority defines, 'printing' as 'the art of impressing letters; the art of making books or papers by impressing legible characters.' Many other authorities might be added, but these are considered sufficient to show the marked difference between the generally recognized meaning of the words 'published' and 'printed,' and sufficient also to show that the publication in the case under consideration was properly made under the law; for, while it is admitted that the *Santa Barbara Gazette* was printed at San Francisco, it is clearly shown that said paper was first 'made public to the people at large' (i. e., published) in the county of Santa Barbara.

"The remaining objections, as heretofore stated, to the publication of the Terrell survey are that said publication was not made in February and March, 1861, in the *Los Angeles Star* and *Santa Barbara Gazette*, as certified by the

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surveyor-general, but that the publication was made in September and October, 1860, in the *Los Angeles Star* and *Pacific Sentinel*, which publication was prior to the date when the plat and field-notes of said survey were approved, on the twenty-ninth day of January, 1861. In support of these allegations there is no evidence, except the affidavit of Mr. Ward, then owner of the rancho, and of John Nugent, one of Mr. Ward's counsel in the case. The first named does not positively admit that the survey of the Guadalupe, Diego Olivera *et al.*, confirmees, was ever published, though he says a certain rancho, called Guadalupe, was published; but Mr. Nugent, in effect, swears that as late as July, 1866, no plat and field-notes of the rancho under consideration were ever exhibited as the official plat and field-notes approved by Surveyor-General Mandeville, but one which had on its face a note showing said publication to have been made in September and October, 1860, in the *Los Angeles Star* and the *Pacific Sentinel*, and also showing the approval of said plat and field-notes to have been made in January, 1861. By this showing it would seem that, even admitting the facts set forth by the ranch owner and his attorney, the Guadalupe survey was final by publication so far as these objections are concerned, as the honorable Secretary of the Interior, in the case of the rancho Tajauta, decided on the twenty-first of February, 1872, that a publication by the surveyor-general that a certain survey had been approved was in itself a sufficient approval prior to publication to satisfy the requirements of the act of fourteenth of June, 1860, notwithstanding the plat bore upon its face an approval subsequent to said publication. But I am not satisfied of the correctness of the facts stated in said affidavits, for the record evidence of the surveyor-general's office and the district court contradicts said affidavits in every important particular; and let it be once established that the testimony, without cross-examination, of two interested witnesses shall be sufficient to overturn the certificates of three sworn officials of the government, two surveyors-general, and the clerk of a United States District Court having jurisdiction in the matter, and the surveys of the numerous

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ranchos considered final by publication are no longer fixed upon that firm basis contemplated by the law. Nothing but the most clear and positive evidence ought to be admitted to set aside such a record, particularly when, as in this case, it was acquiesced in by the parties in interest, at the date when it was made, and for years thereafter.

"That the Guadalupe rancho, Diego Olivera *et al.*, con-firmees, was published in the Los Angeles *Star* and the *Pacific Sentinel* in September and October, 1860, is, in my opinion, not proven; neither is the insinuation in Mr. Ward's protest, that said rancho might have been mistaken for some other rancho Guadalupe, entitled to any weight, for there is but one rancho of that name confirmed to Diego Olivera *et al.* in the State of California.

"A careful examination of the papers in the case upon which this office rejected the Terrell survey, and also the papers filed subsequent to such rejection, leads me to the conclusion that such action was erroneous, and that said survey was properly approved on the twenty-ninth of January, 1861, and published in the months of February and March of the same year in the Los Angeles *Star* and the Santa Barbara *Gazette*, and no objections thereto having been made within the time allowed by law, it became final by publication under the provisions of the act of Congress, approved June 14, 1860 (12 Stats. p. 33). The patent executed in June, 1866, was therefore correctly executed, and is a good and valid patent for the rancho aforesaid, and is herewith transmitted for delivery to the party or parties properly entitled thereto. Said patent having been legally executed, the subsequent patent was without authority of law, and therefore void *ab initio*, and, being now in the possession of this office, will be canceled.

"You will give notice of this decision to all parties in interest, allowing sixty days from date of notice for appeal to the honorable Secretary of the Interior, at the expiration of which time, if appeal be taken, you will forward all the papers in the case, as in other cases of appeal; and if no appeal be taken, you will so notify this office.

"Very respectfully, WILLIS DRUMMOND,

"Commissioner."

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They also produced an indorsement of that commissioner upon the patent, declaring its cancellation. It is as follows:

"Canceled, see decision dated June 12, 1872, of general land office, affirmed by the honorable Secretary of the Interior, March 26, 1873. WILLIS DRUMMOND, commissioner. General land office, April 10, 1873." (For other facts, see *Le Roy v. Clayton*, 2 Sawyer, 495.)

Subsequently, on the twenty-third of the same month, this cancellation was revoked by order of the Secretary of the Interior, and the revocation is also indorsed upon the patent. The Secretary states, in his communication to the commissioner, that the revocation was directed to enable the claimant to appear in court, and correct what he asserts to have been an error committed against his rights, and not for the purpose of revoking or altering the decision made. In connection with these documents, which were admitted subject to the objection of the plaintiff, the defendants produced another patent to the same parties, issued in June, 1866, which is referred to in the decision of Commissioner Drummond, and this patent, they contend, was the only valid patent which could be issued of the premises confirmed under the Mexican grant to Olivera and Arellanes, from whom the plaintiff derails his title. That grant was of a rancho or tract of land known by the name of Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by the board in 1853, and by the decree of the District Court of the United States in 1857. This decree became final by stipulation of the attorney-general, abandoning an appeal taken from it to the Supreme Court of the United States.

In September, 1860, the claim thus confirmed was surveyed under instructions of the surveyor-general for California, by his deputy, Terrell, and the survey and plat of the premises were approved by him on the twenty-ninth of January, 1861. On the thirty-first of May following, that officer filed in his office a certificate to the effect that the rancho confirmed had been surveyed; and that the survey and plat were approved by him on the day mentioned; that he had,

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during the previous February and March, caused to be published once a week for four weeks successively, in two newspapers, to wit: the *Santa Barbara Gazette*, published in the county of Santa Barbara, and the *Los Angeles Star*, published in the city and county of Los Angeles, a notice that the land had been thus surveyed, and that the survey and plat had been approved by him; that the survey and plat were retained in his office during the four weeks, subject to inspection; and that no order for their return to the United States District Court had been served upon him. At the time the survey and plat thus mentioned were made, and this certificate was filed, J. W. Mandeville, Esq., was the surveyor-general of California. On the twenty-fifth of May, 1863, nearly two years after this paper was filed, Edward F. Beale, Esq., who was the successor in office, as surveyor-general, of Mandeville, transmitted to the commissioner of the general land office at Washington a copy of the plat of the tract surveyed, with the certificate contained in the above opinion of Commissioner Drummond, that he had caused the publication of notice that the survey of the tract had been made, in the *Santa Barbara Gazette* and *Los Angeles Star*, as stated in the certificate of his predecessor. The new surveyor-general evidently copied the language of his predecessor, and inadvertently ascribed to himself an act which could only have been done by that officer.

Upon the transcript of the proceedings for the confirmation of the claim and this certificate of Surveyor-General Beale, a patent was issued from the general land office to the confirmees of the grant, on the thirtieth of June, 1866, signed by the President, under the seal of the United States, and recorded in the proper records of the land office. This patent was, in August, 1866, transmitted to the surveyor-general of California, to be delivered to the parties entitled to its possession. Immediately upon receiving notice of its issue, John B. Ward, at the time the owner of the premises, and entitled to the patent, refused to accept it, alleging that the survey of the premises did not conform to the decree of confirmation, and was not final under

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the act of 1860, as the requirements of that act with respect to publication had not been complied with. Soon afterwards, he presented to Commissioner Wilson, of the general land office, certain documentary evidence, to establish his allegations, accompanied with a petition that the patent might be recalled and a new survey ordered.

That evidence showed that the *Santa Barbara Gazette*, in which publication was made, was printed and published in the city of San Francisco, and not in the county of Santa Barbara. The evidence at least satisfied the commissioner that the publication was not made in conformity with the law of 1860, and also, that the survey was erroneous. The patent of 1866 was accordingly recalled by him, and a new survey ordered, under the act of 1864. Such survey was made in 1867, and duly advertised; and was forwarded by the surveyor-general, with his approval, to the commissioner. Upon this survey a new patent was, on the eighteenth of March, 1870, issued to the same parties as the original patent, signed by the President under the seal of the United States, and recorded in the proper records of the land office. This patent was then forwarded by the commissioner by mail to the surveyor-general of California, for delivery to the party entitled to its possession. Some days afterwards, and before its arrival in California, the commissioner telegraphed to the surveyor-general to return the patent, and it was accordingly returned. Two years afterwards, in June, 1872, Commissioner Drummond, the successor of Commissioner Wilson, reviewed the latter's action, had in 1866, in directing the new survey, and his subsequent action in issuing a new patent, and, as shown by his decision above given, held that such action was without authority and void; that the Terrell survey of 1861 was conclusive, and accordingly directed a cancellation of the second patent, and in its place a delivery to the patentees of the recalled patent of 1866.

Evidence was also given as to the boundary line dividing the grants upon which the two patents were issued, which is sufficiently stated in the opinion of the court.

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The case was held under advisement for some weeks, when judgment was rendered in favor of the plaintiff.

John B. Felton & Wm. H. Patterson, for the plaintiff.

Gray & Haven, D. M. Delmas, and S. F. Lieb, for defendants.

Mr. Justice FIELD. If the facts stated in the opinion of Commissioner 'Drummond annexed to the patent of 1870 cannot be considered as facts in evidence, there is nothing before the Court impairing the validity of that patent. The indorsements on the copy produced show a revocation by the Secretary of the cancellation directed by the commissioner; and if titles can be affected in this irregular way, can be divested and reinvested by indorsements of the officers of the land office upon its records, the revocation is of equal validity with the cancellation. The case, as thus presented, would be that of two patents to the same parties, the second covering a larger tract than the first, with the admission of counsel that the second was issued upon allegations by the owner of error in the survey of the premises covered by the first, and of its insufficient publication under the act of 1860. Without other knowledge on the subject we could not say that the second patent was invalid. Cases may often occur where a second patent would be necessary to prevent gross wrong to the patentee. If, for instance, a confirmation and a survey embraced three distinct tracts, and by mistake the survey returned and the patent issued covered only two of them, we do not see why, upon a proper presentation of the fact, and application of the claimant, the commissioner might not issue a second patent, either for the omitted tract or one embracing the three tracts together. The administration of the land department would be very defective if a mistake of this kind could not be remedied upon the consent of the parties before the acceptance of the patent had rendered the proceeding a closed transaction.

If, then, any consideration is to be given to the argument of counsel, that the second patent in the case was properly cancelled because the first patent was conclusive of the

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rights of the parties, the facts stated in that opinion must be treated as in evidence; they were apparently so regarded by counsel on the argument, and for the present we shall so treat them.

We are therefore required for the disposition of the case to consider the validity of the action of the two commissioners of the general land office;—that of Wilson in cancelling the patent of 1866 and issuing the one of 1870; and that of Drummond in annulling the action of Wilson and directing cancellation of the patent of 1870.

Previous to the act of June 14, 1860, the commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836, reorganizing the general land office. It necessarily embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control. He was invested with this necessary power to prevent the consequences to individuals, as well as to the public, of accident, inadvertence, irregularity or fraud. (*Castro v. Hendricks*, 23 How., 443.) His duty in these cases was to compel conformity in the survey made with the decree of confirmation, where that contained a description of the land sufficiently specific to guide the surveyor, but if it contained no such description, then to compel a survey in a compact form, so far as such compactness was consistent with the natural features of the country, and the previous selection of the confirmee as shown by his residence, cultivation and sales. This authority of the commissioner continues under the act of 1864. But by the act of 1860, and so long as that act was in force, his power in this respect was withdrawn.

That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing a patent thereon. It

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provided that the surveyor-general, when he had caused, in compliance with the thirteenth section of the act of 1851, a private land claim to be surveyed, and a plat thereof to be made, should give notice that the same had been done, and that the plat and survey were approved by him, by publication once a week for four weeks in two newspapers, one of which was to be in a paper "where the place of publication was nearest to the land," and the other in a paper published in San Francisco, if the land was situated in the northern district of California, and in Los Angeles, if situated in the southern district. The act also provided that, until the expiration of the publication, the survey and plat should be retained in the surveyor-general's office subject to inspection; that upon the application of any party whom the District Court or a judge thereof, should deem to have such an interest in the survey and location of a land claim, as to make it just and proper that he should be allowed to intervene for its protection, or on motion of the United States the District Court should order the survey and plat to be returned into court for examination and adjudication; that when thus returned notice should be given by public advertisement, or in some other form prescribed by rule, to all parties interested, that objection had been made to the survey and location and admonishing them to intervene for the protection of their interests; that such parties having intervened might take testimony and contest the survey and location, and that on hearing the allegations and proofs, the court should render its judgment approving the survey, if found to be accurate, or correcting or modifying it, or annulling it and ordering a new survey, if found to be erroneous, and generally to exercise control over the survey until it was made to conform to the decree of confirmation.

And the act then declared that when after publication, as thus required, no application was made for an order to return the survey into court, or the application was refused, or if granted the court had approved the survey and location, or reformed or modified it and determined the true location of the claim, it should be the duty of the surveyor-general to transmit, without delay, the plat or survey of the

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claim to the general land office; and that the patent for the land, as surveyed, should *forthwith* be issued therefor; and that "the plat and survey so finally determined by publication, order or decree," as the same might be, should "have the same effect and validity in law, as if a patent for said land so surveyed had been issued by the United States." It is plain, from this language, that it was the intention of Congress to withdraw from the commissioner the supervision and control of surveys subsequently made of private land claims under Mexican grants in California.

But there was still a duty resting upon that officer. To render the survey final, when not subjected to the judgment of the District Court (which acquired jurisdiction by a return to it of the survey), it was necessary under the act, as already seen, that the publication required should be made. This was an essential prerequisite to its finality; nothing else could be substituted for it. And though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the surveyor-general was evidence of this fact, but it was only *prima facie* evidence; unquestioned, it might be taken as conclusive; when questioned, the commissioner could go behind it. The documents presented to him disclosed the fact that no publication of notice of the Terrell survey had been made in a paper published nearest the land. They allege that the *Santa Barbara Gazette* was, in January and February, 1861, published in the city of San Francisco, and not in the county of Santa Barbara, which is distant several hundred miles from that city. Of these documents one was an affidavit made by a person employed upon the *Gazette*, and the other by a subscriber to the paper. Both of them were made upon personal knowledge, and were positive in their character. And yet an affidavit of the widow of one of the publishers of the paper, made four years afterwards, that the *Santa Barbara Gazette*, though printed in San Francisco between January and October, 1861, was sent as soon as printed to Santa Barbara for distribution, was considered by Commissioner

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Drummond six years afterwards, sufficient to overthrow these allegations. This distribution constituted, according to his judgment in reversing the action of his predecessor, the publication of the paper in that county within the meaning of the act of Congress.

Assuming for the present that Commissioner Drummond possessed at the time authority to annul the action of his predecessor, if deemed erroneous, we do not agree with him in his conclusion as to the sufficiency of the publication. It was not alleged in the affidavit of the widow, and it could not be presumed from the mere heading of the paper, admitted to be printed elsewhere, that the entire issue was sent to Santa Barbara, though intended principally for circulation there. Certainly, a presumption of the kind was very slight ground upon which one public officer could undertake to set aside the deliberate act of his predecessor, had years before, upon which rights of property rested. The statute says that the notice must be published in a paper where the place of its publication is nearest the land, not where the place of its distribution is nearest. In one sense, a paper is published in every place where it is circulated, or its contents are made known. But it is not in that general sense that the language, "place of publication," in the statute is used. That language refers to the particular place where the paper is first issued, that is, given to the public for circulation. Nearly all the great dailies published in the city of New York are distributed in different parts of the country. Large packages of these papers are daily made up and immediately transmitted to California, where the packages are opened and the papers distributed. A large number of them in this mode, no doubt, find their way to the county of Santa Barbara; yet it would do violence to our apprehension of the term to say that these papers are published in Santa Barbara, in the sense of the statute. No one so understands the term in ordinary parlance, and it is not used in the statute in any technical sense.

But there is disclosed in the opinion of Commissioner Drummond, another fact, which makes it clear that no suffi-

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cient or legal publication was made, and that is, that the notice published omits the material statement required by the statute, that a survey and plat of the claim confirmed had been made and approved by the surveyor-general. All that is stated in the notice is that the surveyor-general had examined and approved of the rancho Guadalupe, confirmed to Olivera and others, and that the plats would be retained in his office, subject to inspection, for four weeks from the date of the publication. A party might perhaps reasonably infer that reference was thus intended to some survey of the land, but he would not be obliged to take notice from the statement that the surveyor-general had caused a survey and plat to be made, or had approved of one made by others under his directions.

The commissioner appears to have given controlling weight, in overruling the action of his predecessor, to the certificates of Surveyors-General Mandeville and Beale, and of a clerk of the United States District Court. The certificates were only *prima facie* evidence, and before the patent was issued, and afterwards, if the patent was properly recalled, the commissioner was at liberty to go behind them, and inquire whether notices had been in fact published, as there stated. The certificate of Surveyor-General Beale, as to the publication, was of matters not within his personal knowledge. And the same may be said of the certificate of the clerk, so far as the acts of the surveyor-general and his publications were concerned; as to them it was without any value whatever. The clerk can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases, but that is the extent of his authority. His certificate would have been just as valuable as evidence had it related to the acts of the commissioner himself, and yet the commissioner twice refers to it as having some potentiality in the matter.

But aside from all considerations of this kind, the case cannot be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented upon that evidence because, upon its supposed insufficiency, Commissioner Drummond justified his attempted

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annulment of the action of his predecessor and the cancellation of the second patent. If the patent of 1866 could be recalled at all, the sufficiency of that evidence is not a subject for consideration in this form of action, any more than the sufficiency of the evidence upon which any other step in the progress of the proceeding for a patent was taken. As we have already stated, it was the duty of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, to examine into the regularity and sufficiency of the alleged publication. That was a matter submitted by the law to his determination; and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected on appeal by his superior, the Secretary of the Interior. The commissioner has undoubtedly a right within a reasonable period, upon proper application, to reconsider any matter previously determined by him, but such right must be exercised before proceedings upon the original ruling have been taken and concluded. It would be a dangerous doctrine, creating great insecurity in titles, if the correctness of his action upon a matter over which he has jurisdiction could years afterwards be annulled by his successor, because of supposed errors of judgment, upon the sufficiency of evidence presented to him. And it would be without precedent and against principle for a court of law, in an action of ejectment upon a patent, to inquire collaterally into the sufficiency of such evidence to justify the action of the commissioner, and to submit that question to the determination of a jury. The patentee, if such a proceeding were permissible, would find his title established in one case and rejected in another, according to the varying judgment of different juries.

It becomes important, therefore, to determine when a patent of the United States for land takes effect, that is, when it becomes operative as a conveyance and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing

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between acts which bind the Government, and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the Government is bound, the patentee is bound also, without reference to his assent on the subject; but nothing is farther from the fact. No one can be compelled by the Government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the Government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the Government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is in this respect no difference between the patent of the Government and the deed of a private individual.

The question then, in all cases is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition its operation is no longer subject to the control of the grantor; that then depends upon the grantee. The answer to the question is not difficult. If the instrument be the deed of a private individual it is in a condition for acceptance when it is offered for delivery, that is, when the grantor has parted with its possession or the right to retain it, in order that it may be given to the grantee. (*Jackson v. Dunlap*, 1 Johnson's Cases, 116; *Jackson v. Phelps*, 12 John. 418; *Jackson v. Bodle*, 20 Id. 184; *Church v. Gilman*, 15 Wendell, 656; *Hulick v. Scoville*, 4 Gilman, 159; *Bullitt v. Taylor*, 34 Miss. 741.) If the instrument be the deed of the Government, that is its patent, it is in that condition when the

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last formalities required by law of the officers of the Government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. By these acts, open and public declaration is made that so far as the general Government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee in such case takes by matter of record, the law deeming, as says Mr. Justice Story, speaking for the Supreme Court, "the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage." (*Green v. Lister et al.*, 8 Cranch, 247.)

In case of a private deed, it is essential that the grantor should part with its possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed; with the close of the record the power of the officers of the Government over the instrument is gone. Whether it thereafter remain in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

But assuming the correctness of this doctrine in cases of ordinary transfers by the Government of property by sale or gift, it is argued by counsel that it has no application to patents issued upon a confirmation of Mexican grants in California. The argument is, that the Government, in dealing with claims to land under these grants, acts as a sovereign over a subject within its exclusive jurisdiction; and, that in the discharge of its treaty obligations, it has declared in what manner such claims shall be presented; by what officers their validity shall be tested and location determined, and by what document the result of the proceed-

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ings, when favorable to the claimant, shall be authenticated. The patent, it has declared, shall be issued by the commissioner when its tribunals have adjudged that the claim is valid, and its officers have correctly surveyed it. The claimant, say the counsel, cannot prevent the agents of the Government from performing the duties which the law has imposed upon them. He is as powerless to prevent the issue of the patent as he was to annul the survey or control the decree. The law commands the commissioner to issue the patent, and with the discharge of that duty the confirmee cannot interfere. No act of the latter can enlarge or abridge the commissioner's powers. And hence the efficacy of the patent in these cases does not depend upon the acceptance of the patentee.

The argument is plausible, but not sound; it proceeds upon the assumption that an acceptance of the patent must be by assent subsequent to its issue. But subsequent assent is not essential. A previous application for a patent is as persuasive evidence of its acceptance as any subsequent assent; that is, if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851. The claimant asks in effect that his claim may be recognized and confirmed by an appropriate decree; that then a survey conforming to such decree may be made in the mode prescribed by law, and that a patent thereupon be issued to him. When a patent is thus issued it will take effect without reference to any subsequent action of the patentee. He has in advance, by his proceedings, signified his acceptance. But on the other hand, if the patent in such case be issued without a final survey, that is, one determined in the prescribed mode to be conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He asked what the law authorized him to have, and so far as the law is disregarded in the survey he stands free as to his acceptance of the result. He can in such case, by prompt expression of dis-

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sent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.

Such was the case with the patent of 1866; it was issued upon the supposition that the survey had become final by proper publication. The owner of the ~~patent~~ ^{claim} insisted that no such publication had been made, and that the survey was not therefore final and binding upon him, and was in fact erroneous, and on that ground refused at once to accept the patent, and asked for a new survey. The commissioner of the general land office was, upon this refusal and petition, at liberty to look again into the alleged finality of the survey, that is, into the sufficiency of the publication, for on no other ground than its insufficiency could he depart from the survey returned. The proceeding was one between the patentees and the Government, and if the patentees, before accepting the patent, consented that the regular officer of the Government might go behind the record and re-examine the matter which had been by law intrusted to him, and correct an error which had been committed, by accident, inadvertence, or otherwise, we do not perceive how any third party can object, and assail the second patent on that ground. If the defendants, or other third parties, have superior rights to those of the patentees, they are no more affected by the correction of the error in the survey than they would have been had the error never been committed. And if they have no such superior rights they cannot, upon any just principle of law or morals, contend that the error committed to the injury of the patentees or their successor in interest, shall be for ever irreversible. This is not a case where any doctrine of estoppel for alleged acts or conduct of the parties applies.

The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered, the transaction is closed; the title has passed, and any subsequent alteration of the instrument, or its destruction, cannot affect the grantee's title. But if not accepted when tendered, the deed may be

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corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the fact that whilst the individual grantor is not restricted in his alterations, the officers of the Government, acting under the law, can only, even by consent of the patentee, go behind the record to correct an error committed to his injury in disregard of rights secured to him by the law. The Terrell survey not having become final, and the commissioner being satisfied that it was erroneous, a new survey was properly ordered, under the act of 1864, which was then alone applicable. It is conceded that the subsequent proceedings, including the issue of the patent of 1870, were in accordance with its provisions. Our conclusion is, that the patent of 1866 was lawfully recalled, and that the patent of 1870 was properly issued, and is a valid instrument, binding both upon the Government and the patentees and their successor in interest. After it was recorded, the officers of the Government were powerless to change it or cancel it, without the consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded.

The grant, upon which the patent held by the defendants is founded, was of a rancho known as La Punta de la Laguna, adjoining the rancho Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by that tribunal in 1854, and by the decree of the District Court of the United States in 1857. This decree, like that in the Guadalupe case, became final by stipulation of the attorney-general, abandoning an appeal taken from it to the Supreme Court of the United States. In September, 1860, the claim confirmed was surveyed, under instructions of the surveyor-general for California, by the same deputy who surveyed the Guadalupe rancho, and the survey and plat were approved, as in that case, on the twenty-ninth of January, 1861, and a similar certificate of publication of notices of the survey and plat, in the same papers, and for the same period, was filed by the surveyor-general, on the thirty-first of May, 1861. From some unexplained cause, the survey and plat do not appear to have

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been forwarded to the general land office, for a patent, until 1873, for the certificate of the original by the surveyor-general, incorporated into the patent, is dated in July of that year. The patent, as already stated, was issued in October, 1873. Whatever defect existed in the publication of notices of the survey and plat, in the *Santa Barbara Gazette*, in the Guadalupe case, existed in this case. No objection, however, appears to have been taken before the general land office on that ground, and objections to the survey of that character were obviated by the acceptance of the patent. The demanded premises are covered by this patent. We have, then, the case of two patents regularly issued, each embracing the land in controversy. We must, therefore, look behind them, to the original grants, to ascertain which of them carried the better right to the premises. As already said, they adjoin each other; the eastern line of one is the western line of the other. If we can find this line, the difficulty is, of course, solved. The grant of the Guadalupe rancho only designates generally the location of the land, without giving any specific boundaries, but in April, 1840, which was the month following its issue, possession was officially delivered to the grantee by the magistrate of the vicinage, a proceeding necessary, under the law of Mexico, to a complete investiture of title, and called, in the language of the country, juridical possession. This proceeding involved a measurement of the land, and its segregation from the public domain. A record of the proceeding, showing the measurement and the boundaries established, was made, and a copy is produced in evidence.

The grant of the rancho La Punta de la Laguna describes the land granted as bounded by various designated ranchos. In January, 1845, juridical possession of these premises was also given to the grantees by a magistrate of the vicinage. A record of this proceeding was also preserved, and a copy is in evidence. These records were before the land commission, and the United States District Court when the grants were confirmed, and in the decrees of confirmation the boundaries there given are followed.

If, now, we look at the decree in the case of the rancho of La Punta de la Laguna, we find the dividing line between it and the rancho Guadalupe thus described: "Commencing on the top of the Lomas de la Larga, and running northerly over the plain, crossing the middle of the laguna, the distance of ten thousand two hundred varas to the Cuchillo de Nipomi, where two roads ascend, and where a stake was driven as a boundary." The different objects here stated have all been identified. The position of the top of the Lomas de la Larga is admitted to be at a live oak marked on the survey; the laguna, of course, lies where it always did; and the point where the stake mentioned was driven has been shown. The line thus given is the one laid down in the new survey of the Guadalupe rancho upon which the patent of 1870 was issued. We are satisfied that it is the true line. It would serve no useful purpose to go minutely into an examination of the evidence presented against this view. It is sufficient to observe that it has not created any serious doubt in our minds as to the correctness of this line. This conclusion disposes of the question of conflict of boundaries.

It is admitted that the defendants, except such as disclaimed, were in the possession of the premises in controversy at the commencement of the action; but there is no evidence of their possession at any previous period. There is, therefore, no basis laid for the recovery of any other than mere nominal damages for the alleged previous possession; and none, accordingly, will be awarded.

The plaintiff must have judgment for the possession of that portion of the demanded premises which is covered by the patent of 1870, with one dollar damages.

Counsel for the plaintiff will, within ten days, prepare special findings in the case, and submit them to the Court for settlement, upon notice to the counsel of the defendants; otherwise, a general finding will be filed.

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THE ORIFLAMME.

DISTRICT COURT, DISTRICT OF OREGON.

JUNE 30, 1875.

1. CARRIERS OF PASSENGERS.—Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident.
2. PASSENGER ENTITLED TO BERTH.—An undertaking to carry a passenger in the steerage of a steamship from San Francisco to Portland includes the furnishing of such passenger with a berth, unless there is a fair understanding to the contrary.
3. STEERAGE PASSENGER.—A steerage passenger is entitled to the use of the steerage room to walk about or sit down in during the voyage, without the risk or inconvenience of freight therein; but if freight is stowed therein it is at the risk of the carrier, and it is his duty so to stow and secure it that no harm will be caused to the passengers by it; nor can the carrier impose any arbitrary regulation upon the passengers with a view of diminishing such risk—such as to remain in their berths during the whole voyage, or any unusual portion of it.
4. FREIGHT IN STEERAGE.—Where a number of boxes of tin were stowed in the after part of the steerage, so as to make a pile six feet in length, three feet in width, and from five to eight feet in height, without any means of preventing the top tiers from sliding off on the floor in case of rough weather; and a steerage passenger sat down by the side of said pile, and was injured by the rolling of the ship causing some of the boxes to fall upon her: *Held*, That the stowing of the tin in the manner in which it was done was gross negligence, and the carrier was liable to the passenger in damages for the injury.
5. DISFIGUREMENT OF PERSON—DAMAGES FOR.—Disfigurement of the person caused by such an injury is a proper subject of damages, but in estimating them it is proper to consider the condition and circumstances of the party disfigured.

Before DEADY, District Judge.

The facts appear in the opinion of the Court.

John W. Whalley and M. W. Fechheimer, for libellants.*Joseph N. Dolph*, for claimant.

DEADY, J. This suit is brought by the libellant, Ernestine Koch, to recover \$3000 damages for injuries to her person, caused by the negligence of the respondent and claimant, the Oregon Steamship Company, while engaged in

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transporting her in the steerage of the steamship *Oriflamme*, from San Francisco to Portland. It is substantially alleged in the libel, that a number of boxes of tin were so negligently and insecurely stowed in the steerage, that the rolling of the ship caused some of them to be thrown on the libellant, whereby she was greatly injured and disfigured.

The respondent admits the contract to carry the libellant, and that she was slightly injured during the voyage, but alleges that the boxes of tin were securely stowed in the steerage; that the libellant was furnished with a berth and directed to remain in it while crossing the San Francisco bar and during rough weather; but that the libellant left her berth and negligently sat down by said pile of tin, upon some packages of baggage belonging to the steerage passengers, when the motion of the ship caused said packages to roll from under her, and "she was thereby thrown upon the floor of the steerage and one of said packages of baggage was rolled against the libellant, and she was thereby or by being precipitated against the standard, supporting the berths, slightly bruised."

In addition to the libellant, ten witnesses from among the steerage passengers, were examined on her behalf as to circumstances of the alleged injury. They were all Germans, but had no particular acquaintance or relation with the libellant, and so far as appeared, testified fairly and without prejudice.

For the respondent three witnesses were examined in relation to such circumstances, namely, the steerage steward, the porter and the second mate. All these witnesses belong to the ship, and testify under circumstances calculated to induce them to speak as favorably for the respondent as possible. Particularly is this the case with the mate, who is responsible for the manner in which the tin was stowed, and the steerage steward, whose duty it was to provide the libellant with a berth, if possible. The steward's testimony is not consistent with itself, and is in direct conflict on material points with that of other witnesses, who appear to be credible. He states that the pile of tin was not more than eighteen inches high, and that he gave libellant a

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berth, which she declined to occupy. The second mate says the pile was from twenty-two and a half to twenty-five inches high, and contained four tiers of boxes. The porter's testimony is silent as to the height of the pile prior to the accident. The men who stowed the tin, under the direction of the mate, were not called by the respondent, nor their absence accounted for. Neither was the chief steward, although he appears to have been in the steerage, assisting in taking care of the libellant immediately after the accident.

The libellant and six of the steerage passengers swear positively that the pile was upwards of five feet high, and the others state the circumstances concerning the casualty, which strongly tends to prove the truth of this statement. For instance, if the pile of tin was only eighteen inches or two feet high, it is impossible that these passengers could have found the libellant on the floor, with some of the boxes of tin on top of her, as they testify they did, unless the ship had turned upside down.

I find the facts to be as follows: The libellant, a respectable German servant girl, of nineteen years of age, on March 20, 1875, at San Francisco, while emigrating from Germany to Oregon, took passage on the respondent's steamship—the *Oriflamme*—for this port. The family with which she lived in Germany were cabin passengers on the same vessel, and had procured her a steerage ticket for fifteen dollars.

The libellant could not speak English, and the steward in charge of the steerage could not speak German. Several of the passengers appear to have been without berths or sleeping accommodations of any kind. No berth was assigned to the libellant, nor was there any vacant one which she might have occupied, except a lower one, which was in an unfit condition.

In the afterpart of the steerage a number of boxes of tin, weighing about one hundred pounds each, were stowed against the bulkhead, dividing it from the freight-room, making a pile of about six feet across the vessel, three feet fore and aft, and from five to eight feet high. The pile was

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somewhat in a pyramidal form—sloping back toward the bulkhead and center from the lower tiers or base. Cleats were put around the base of the pile, to keep it from shifting bodily, but there were no means taken to keep the upper tiers in their place, or from slipping off the pile. Around the base of the pile was stowed a number of carpet-sacks, hand-trunks and bundles belonging to the steerage passengers.

The ship left the dock between ten and eleven o'clock A.M., and the libellant, at the suggestion of some of the Germans in the steerage, placed her carpet-sack at the end of the pile on the starboard side of the ship, and sat down on it. Somewhere about one o'clock of the same day, between the San Francisco bar and Point Reyes, and about five or six miles north of the bar, while the vessel was going at usual speed, with a heavy swell on her side, she rolled so far over to starboard, that several of the boxes of tin slipped off the top of the pile, and struck the libellant on her head and right shoulder and threw her forward on her face. Some of the passengers immediately ran to her assistance, when they found her stunned or fainted away, while the carpet-sacks, hand-trunks and boxes of tin were lying around her, and some of the latter on her body and legs. They immediately removed the boxes and drew her from among them. Word of the accident was at once sent on deck, and the steerage steward and the porter—the latter of whom could speak German—came down and took charge of the girl. Her face was covered with blood from a contused cut to the bone, on the forehead, over the right eye, and about one inch in length. Her right shoulder and arm were badly bruised as were also her legs—and particularly one of her ankles. After cleansing her face and binding up the wound on her forehead, they placed her in a berth in the steerage, where she remained without any other care or attention, so far as appears, until the next day, when she was removed to the lower or servant's cabin in the after part of the vessel, and placed in a berth, where she remained until she reached Portland and left the vessel.

The medical experts are of the opinion that the bone was

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not injured by the wound on the forehead, although it may have been. It is not yet healed. For some reason, not satisfactorily explained by the testimony, the wound does not heal, and still suppurates. At times the libellant suffers severe pain in the head on account of it, and cannot do labor which requires her to exert herself by lifting or stooping. Still, it is not probable that any permanent injury will result from the wound. But she received a very severe shock of the brain, and came very near losing her life. The scar resulting from the wound will be permanent, and somewhat disfigure the libellant. It will be about three-quarters of an inch in length, one-third of an inch in greatest width and irregular in outline. The arm and lower limbs are recovered from the bruises.

The libellant does not appear to have been visited by the master of the ship after the accident, or to have received any medical attendance, or special care or nursing. She was lying in the berth on her back, probably in a partially comatose or delirious state, most of the time, until she reached Portland. During this time, she was visited occasionally by the stewardess and porter, but took no food or nourishment, and did not change her clothing. She was able to walk when removed from the steerage to the lower cabin, with the assistance of a person on either side, and walked to a house near by when she left the ship at Portland; but she was confined to her bed for some days afterward, during much of which time she had fever and was delirious. Within two weeks after her arrival in Portland, she went into service in a family in the city, where she still remains, but is not yet able to do a woman's work on account of her head.

Upon this state of facts, there can be no doubt as to the liability of the respondent. In *Shearman & Redfield on Neg.* section 266, the rule in regard to carriers of passengers is laid down as follows:

“Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the

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preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances."

There does not appear to have been any special contract that the libellant was to be furnished with a berth during the voyage, nor has it been shown that there is any statute of the United States applicable to the subject. For although, on this occasion, the *Oriflamme* sailed from a "port in the United States" to a port "on a tributary of the Pacific ocean," and is therefore within the letter of section 4265 of the revised statutes, I cannot think she was within the spirit of it or within the contemplation of Congress when the act was enacted. Still, I think the undertaking to carry a passenger, either in the steerage or cabin, between the ports of San Francisco and Portland, ought to be construed to include the furnishing of such passengers with a berth, unless there was a fair understanding beforehand that the passenger was to make the voyage without it; and this is particularly so in the case of a female passenger traveling alone. The want of a statute of the United States imposing a penalty upon the carrier for not furnishing berths upon this route, does not affect the question of whether he is bound to do so by his undertaking or not. Such an omission only proves that Congress has not yet seen proper to secure the performance of the contract of the carrier in this respect, by the imposition of a penalty for non-performance. And this seems to have been the theory of the matter upon which the answer of the respondent was framed, for, as has been stated, it is therein alleged that the libellant was furnished a berth.

There was then, negligence upon the part of the ship in not furnishing the libellant a berth. But it does not necessarily follow that this negligence was the cause of the injury received by the libellant. It might have happened, as it did, even if the libellant had been furnished with a berth; for she was not bound to stay in it. She had a right to be up and about in the steerage, if she was able and so inclined, and it was the duty of the respondent to keep the

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steerage-room a safe place for her to walk about or sit down in, so far as the utmost care and skill of a cautious, prudent person would provide under like circumstances.

Ordinarily, the steerage passengers are entitled to the use of the steerage-room, free from the risk or inconvenience of freight therein. Cases may arise in which the passengers are so few in number in proportion to the size of the room, that there can be no objection to some portion of it being used as a freight-room. But in such case, the carrier takes the risk, and it is his duty to so stow and secure such freight that the passengers will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk—for instance, to remain in their berths during the whole voyage or any unusual portion of it.

It is not satisfactorily shown what number of steerage passengers were on board the *Oriflamme* on this voyage. The steerage steward says he thinks there was sixty or seventy of them. Nor is there any evidence as to the size of the steerage-room.

But under any circumstances the stowing of this tin in the steerage, in the manner in which it was done, was gross negligence on the part of the respondent. It was the direct cause of the injury received by the libellant, without any fault or contributory negligence on her part. She had a perfect right to sit down by the side of the pile, unless she knew it was dangerous or was duly warned to avoid it. But she was not so warned, nor can it be claimed under the circumstances that she was aware or had good reason to know of the danger. Apparently it was the most convenient and secure place in the room, of which she could avail herself, to sit or lie down and be out of the way of the crowd, to whom she was a stranger.

The libellant claims \$3000 damages for the injuries received and expenses incurred on account of them.

For everything beyond the actual expense and loss of time incurred on account of the injury, the damages can only be estimated in a general way. In making this estimate regard must be had to the condition in life and the

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circumstances of the parties. (*Hanson v. Fowle*, 1 Saw. 545.) The respondent is a corporation, engaged in transporting passengers and freight between this port and San Francisco. It is the owner of the steamship *Oriflamme*, but of what other property, if any, does not appear. The libellant, as has been stated, is a servant girl, an immigrant from Germany, and about nineteen years of age.

I find that she is entitled to recover for expenses of her sickness and injury to her clothing, \$100; for the loss of time and labor on account of the injury, \$100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, \$300; for the physical and mental pain and suffering caused by the injury and treatment of the libellant while on board the vessel after the accident, \$1000; and, for the permanent disfigurement of the libellant's face from the wound on the forehead, \$500. It may be that the sum of \$500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance, so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living. In manners and appearance, she is a plain girl, moving in an humble walk in life, and not like many others, dependent upon her beauty for her dowry or support.

Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. (*Karr v. Parks*, 44 Cal. 49.) In this country, at least, it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance, comeliness—is a consideration of comparative importance in the case of every daughter of Eve.

Let a decree be entered for the libellant for the sum of \$2000 in lawful currency of the United States and the costs of suit.

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THE FAVORITE AND HER PROCEEDS.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 12, 1875.

1. PROCEEDS OF VESSEL.—A person having an agreement for a mortgage upon a vessel has no such interest in the thing as will entitle him to claim the proceeds of her sale in the registry of the court.
2. EFFECT OF MORTGAGE ON VESSEL.—Section 4192 of the Revised Statutes does not declare the effect of a mortgage absolutely or relatively, with reference to any other lien thereon.
3. PRIORITY OF LIEN.—The lien of a mortgage given for labor in the construction of a vessel is not preferred to the lien of a material-man prior in date to the mortgage.
4. LIEN FOR SUPPLIES.—The lien of a claim for supplies furnished a vessel in the course of navigation is preferred to that of a material-man or mortgages.

Before DEADY, District Judge.

The facts appear in the opinion of the Court.

Joseph N. Dolph and Joseph Simon, for the Oregon Iron Works.

W. W. Upton and Charles Upton, for *E. Spedden et al.*

H. Y. Thompson and George Durham, for *Smith Bros. & Co.*

A. C. Gibbs, for *Northrup & Thompson.*

Benton Killen, for *Bulger et al.*

DEADY, J. In pursuance of a decree of this Court made in the suit of *Thomas Merrill et al.* for wages, against the steam-tug *Favorite*, said tug was, on May 8, 1875, sold for the sum of \$2900. After satisfying the decree, there remained in the registry of the court \$2075.91 of the proceeds of the sale. Pending the suit, persons intervening for their interests libelled the vessel for various sums.

Among others, *Eugene Spedden et al.* filed a libel for the sum of \$5297.60, the value of certain engines, machinery and materials, which, it was alleged, had been furnished by them to J. C. Fox, the owner of said vessel, for the purpose of building and equipping her.

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Upon exceptions to this libel it was dismissed, because it appeared therefrom that the intervenors had taken a conveyance of three-fourths of the vessel in satisfaction of the claim, or that they had waived their lien, by an agreement giving Fox until May 1, 1876, to pay for the materials—more than a year from the time of their delivery.

The other intervenors were twelve in number, and their claims amounted in the aggregate to \$1,707. Four were for supplies furnished the tug while engaged in navigating the waters of this State, but elsewhere than at this port, where she was enrolled and her owner resided; while the remaining eight were for labor and materials furnished at this port, in the latter part of the year 1874, for the purpose of building and equipping the vessel.

On May 14, the Oregon Iron Works, a corporation existing under the laws of Oregon, filed a petition under the admiralty rule 43, for the payment to it of the sum of \$1,443.75 out of said proceeds, alleging that it held a mortgage, duly recorded in the custom house at Astoria, on November 19, 1873, upon the tug *Sedalia*, which was destroyed by fire in June, 1874; for the sum of \$1,500, the price of the boiler and machinery therein; and that afterwards the owners of said tug *Sedalia*, Eugene Spedden *et al.*, aforesaid, sold said boiler and machinery to said Fox, who placed the same in the tug *Favorite*, with the knowledge and consent of the petitioner, said Fox at the same time agreeing in writing with petitioner that as soon as said boiler and machinery were placed in the *Favorite*, he would give it a mortgage on the vessel to secure the payment of the sum due from Eugene Spedden *et al.*, on account of said boiler and machinery, to which agreement said Spedden *et al.*, then and there assented; and that said Fox failed to execute such mortgage to petitioner, but did, on November 9, 1874, give Thomas A. Bulger, a mortgage upon said vessel, to secure the payment of a note made by said Fox to said Bulger on October 31, 1874, for the sum of \$1,317, with interest at the rate of one per centum per month, which mortgage was recorded in the custom house at Portland, on November 10, 1874; and that said Bulger “had actual and

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legal notice" of petitioner's mortgage upon the *Sedalia* and "full knowledge" of the agreement aforesaid. The petition prays that the sum due on the note of said Spedden *et al.* to petitioner for said boiler and machinery, namely, \$1,443.-75, be first paid to petitioner out of said proceeds.

On July 13, Thomas J. Bulger filed a petition under said admiralty rule for the payment to him out of said proceeds of the sum due on the note and mortgage aforesaid, for \$1,317; alleging that said note was given to petitioner by said Fox on account of certain debts then due "petitioner and others for labor as shipwrights in the construction of the steam-tug *Favorite*."

Exceptions were filed to these petitions and libels, and the whole were heard and submitted together.

It is too plain for argument that the iron works acquired no interest in the *Favorite*, and therefore is not entitled to any portion of these proceeds, by virtue of the agreement for a mortgage with Fox. It is not enough that it had an agreement for an interest; it must have had a definite legal interest in the thing at the time of the sale. Neither had it the lien of a material-man. The boiler and machinery were furnished to the *Favorite* not by the iron works, but by Spedden *et al.*, who were the owners of the same. As has been stated, so far as they are concerned, the claim for the materials has been satisfied by a conveyance of three-fourths of the vessel, or the lien discharged by extending the credit to Fox beyond the year during which the local law gave them a lien. The mortgage of the iron works was upon the *Sedalia*, and if upon her destruction it still had a lien upon her boiler and machinery into whosoever's hands they might come, it certainly waived it when it consented that they might be sold to Fox by the mortgagors, to be used in the construction of the *Favorite*. The fact that the corporation made this arrangement or consented to this transaction, relying upon the agreement with Fox for a mortgage upon the *Favorite*, does not affect the question. If Fox has failed to keep his agreement in this respect, that is a matter which cannot be remedied here. This court cannot enforce specific performance of this contract, but must

distribute the proceeds among those who appear to have had an interest in the vessel, without reference to the unperformed agreements between them or any of them and third persons.

But suppose Fox had complied with his agreement, the result would be the same. The claims of the laborers and material-men, including that of Bulger's, will more than absorb the proceeds. The mortgage of the iron works, if it had one, being not to secure a debt for materials furnished by it to the *Favorite*, but a debt due it from Spedden *et al.*, would be postponed to these claims.

In this view of the matter, it is unnecessary to consider the intensified allegation in the corporation's petition—that Bulger had “full knowledge” of its agreement with Fox. Certainly the agreement for a mortgage can have no greater effect than the mortgage itself would. Besides, Bulger being a creditor of the owner for labor performed upon the vessel, and having by statute a lien upon her for the debt, I do not see why he had not a perfect right to take a mortgage upon the vessel for the same, even if he had *actual* notice of the agreement with the corporation for one. No injury would be thereby done to the iron works, because Bulger's claim, both on the grounds of date and cause, would be preferred to it, without the aid of a mortgage. Nor is it admitted, apart from any question of fraudulent preference, but that Bulger might have taken a mortgage upon this vessel to secure any debt due him from the owner, although he knew at the time that the iron works had an agreement with such owner for a mortgage to secure a debt due it.

Bulger claims that he is entitled to be paid before the intervenors, upon the ground that the lien of a mortgage, duly recorded in the custom house under section 4192 of the R. S., which provides: “No bill of sale, mortgage, hypothecation or conveyance of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector

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of customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section,"—is to be preferred to that of a material-man, particularly one whose lien arises under the laws of the State.

In support of this position counsel for Bulger cites *The Grace Greenwood*, 2 Bissell, 131. In that case it was held that the liens of the material-men were not available under the State law (Illinois); and if they were, that being subsequent in point of time to the mortgage, it was to be preferred to them. (See *The Skylark*, Id. 253.) But in this case the claims of the material-men are prior in point of time to the mortgage, with the exception of a few items of small value in one of the accounts.

What effect is to be given to a mortgage under this section as against liens arising under the maritime or State law, for materials or supplies furnished in the construction or navigation of the vessel, has not been considered by the Supreme Court; and the rulings of the lower courts have not been uniform upon the subject.

In *Aldrich v. Ætna Co.*, 8 Wall. 496, the court said that in the case of *White's bank*, 7 Wall. 646, "It was held that the recording of the first mortgage in the collector's office, under the act of Congress, protected the interest of the mortgagee against subsequent purchasers or mortgagees by its own force irrespective of any State law on the subject." There is nothing in the language of the section that indicates an intention to enlarge the operation of a mortgage on a vessel, or place the lien of it in any better condition, with reference to other liens, than it was before. The act from which the section was taken (July 29, 1850) provides for the registration of conveyances and mortgages of vessels of the United States at the port of enrollment, so that all persons dealing in such property may conveniently ascertain the ownership of it, and then, as a sanction to this provision and as a means of enforcing obedience to it, section 4192 declares that any conveyance or mortgage, not so recorded,

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shall be invalid as to third persons not having actual notice thereof.

So far nothing is said about the effect of a mortgage when registered, and but for the proviso excepting "the lien by bottomry" from the operation of the section, it is not apparent how it could ever be construed as preferring or deferring any lien to another. But on account of this proviso it seems to have been inferred that as "the lien by bottomry" is the only one expressly excepted from the operation of the section, therefore all others are within its purview, and thereby made subordinate to that of a mortgage. But this conclusion assumes that the section without the proviso would give a mortgage a preference over a "lien by bottomry." Yet there is not a word in the section on the subject of liens, or that in any way prescribes the effect of a mortgage as against any other lien under any circumstances. The section simply declares that a mortgage upon a vessel of the United States shall not be valid unless registered as therein prescribed; but as to the effect of a valid mortgage, absolutely or relatively, I think it must be held to leave it where it found it. In short, the proviso suggests a scope to the section which its language cannot possibly support. It is therefore superfluous and unnecessary, and, as has often happened in legislation, was probably inserted out of abundance of caution or dearth of knowledge.

My impression is that Bulger gained no right as against the prior liens by taking and recording his mortgage under this section.

But, on the other hand, the material-men claim that under the law of the State (Or. Code, p. 657, section 18), their claims are preferred to those of a mere mortgagee. It is not necessary to consider the objection, that it is not in the power of the State to prefer the lien of a material-man to that of a mortgagee, though I have not heard any good reason why it cannot—at least in the case of liens not given by the maritime law, and until Congress prescribes a different rule upon the subject. Bulger is not a mere mortgagee. His claim is for labor bestowed upon the vessel in its construction by himself and others whose interests he either

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represents or owns, it is immaterial which. By taking a mortgage he did not change the nature of his claim, whatever effect it may have had upon the security. The cause and date of his lien place it among the most favored by the State law, and he is entitled to share equally in the distribution with the eight intervenors whose claims are for materials furnished for the construction of the *Favorite*.

But the other four intervenors, namely, McLean, Gray, Corno, and the Oregon Trading Co., whose claims in the aggregate amount to \$284.96, are entitled to be first paid out of the proceeds. These claims are for supplies furnished to the vessel to enable her to be navigated, subsequent to the date of the mortgage. True, they were furnished within the State, but they were not furnished at the home port, in my judgment. Under the ruling of the *Lottawana*, lately decided by the Supreme Court (8 C. L. N., 305, 21 Wall. 558), what constitutes a home port is yet an open question. But I think upon reason and convenience, the home port ought to be the one where the vessel is enrolled. Away from that place, whether in or out of the State in which her owner resides, she is supposed to be *in itinere*, and therefore relying upon her credit for the purchase of the necessary supplies to complete her voyage.

Assuming, then, that these supplies were not furnished at the home port, the debts due therefor are such as the general admiralty law gives a lien for. This lien is preferred to one given by the local law in favor of a material-man. (*The Grapeshot*, 2 Ben. 527.) And as against a prior mortgagee, such liens should be preferred, upon the obvious consideration that the mortgagee of a vessel which is left in the possession of the mortgagor, impliedly authorizes the latter to pledge her for supplies obtained upon her credit and necessary to her navigation.

The fund will be distributed as follows: 1. The four claims for supplies will each be paid in full, with legal interest from the date of the filing of the respective libels therefor. 2. The remainder of the proceeds will be divided *pro rata* between the eight claims for materials and the claim of Bulger, legal interest being allowed on the claims

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of the material-men from the respective dates of their intervention and upon the claim of Bulger, from October 31, 1874, the date of the note therefor, at the rate therein specified.

The matter will be referred to the clerk to ascertain the sum payable to each of the intervenors according to the rule herein announced, and upon the coming in of his report, a final decree will be entered accordingly.

W. T. WYTHE ET AL. v. D. P. PALMER.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 20, 1875.

1. CONVEYANCE BY ADMINISTRATOR.—The Probate Court of Marion county, in 1856, had no power to authorize an administrator, generally, to convey lands in performance of his intestate's obligations; but only to convey specific premises upon the petition of the person claiming to be entitled thereto.
2. SETTLER UNDER DONATION ACT, WHEN MAY CONVEY.—Where a married settler under section 4 of the Donation Act has completed the residence and cultivation required by the act, and made proof thereof, he is entitled to a patent for his donation, and may convey the same in fee simple. (Per Mr. Justice FIELD.)
3. PLEA TO BILL IN EQUITY.—Plea to bill in equity may be good in part and bad in part.

Before Mr. Justice FIELD, and DEADY, District Judge.

The facts are stated in the opinion of the Court.

C. Gardner and Addison C. Gibbs, for complainant.

W. W. Thayer, for defendant.

DEADY, J. This is a suit for the partition of lots 3, 4, 5, 6, 7 and 8, in block 44, in the town of Salem, Marion county. The complainants are citizens of California, and the defendant is a citizen of Oregon.

The bill alleges, in substance, that the premises are a part of the donation claim of William H. Willson, a married settler on the public lands of Oregon, under section 4 of the

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Donation Act of September 27, 1850, who died intestate on April 17, 1856, after having "complied with all the requirements of said act," and before the issue of a patent therefor, leaving his wife, Chloe A. Willson, and three children, including the complainant, Laura B. Wythe, surviving him. That upon the death of said Willson, the south half of said donation claim, comprising three hundred and eight acres, which had before been duly set apart to him, was, by virtue of said act and the facts aforesaid, duly vested in said widow and children in equal and undivided parts; and that the complainants, by reason of the premises, are now seised of an undivided one-fourth of the lots aforesaid, and entitled to a partition of them. That the defendant is seised of an undivided three-fourths of said lots derived from the widow and two of the children aforesaid, and has received the rents and profits of the premises for ten years, for which they pray an account. The defendant not answering the bill, pleads in bar of it, that he is seised in severalty of an estate in fee simple in the premises. That as to 3, 4, 5, 6 and 7 of said lots he derives title thereto by a sufficient conveyance of the date of March 11, 1858, from the Wallamet University to whom said Willson and wife, for a valuable consideration, duly conveyed the same on December 2, 1854, aftersaid Willson had complied with the requirements of said donation act. That as to said lot 8, he derives his title as follows: On March 31, 1855, said Willson and wife, for the sum of one hundred dollars, executed a sealed instrument whereby they bound themselves to make Henry B. Worden a good and sufficient title to said lot 8 within a reasonable time after they should obtain a title from the United States to said donation claim; and that after sundry assignments said instrument was assigned on June 13, 1857, to George K. Shiel. That on May 28, 1856, the Probate Court of Marion county, duly empowered J. G. Willson and Chloe A. Willson aforesaid, the administrator and administratrix of said William H. Willson, "to convey and transfer lands which the said Willson in his lifetime had obligated himself to convey;" and that in pursuance of said authority, said administrator and administratrix duly conveyed said

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lot 8 to said Shiel, who afterwards on April 26, 1860, duly conveyed the same to the defendant. That the defendant entered into the possession of said premises in pursuance of said conveyances respectively, and has ever since held the same exclusively and adversely to his sole and separate use.

The plea was argued and taken under advisement by the court. The plea of title in the defendant is bad as to lot 8. The Probate Court of Marion county had no power to authorize generally the administrators of William A. Willson "to convey and transfer lands which the said Willson in his lifetime had obligated himself to convey," but only to convey specific premises upon the petition of the person claiming to be entitled to such conveyance. (See Or. Code, 1854, p. 338.) Upon any construction, then, of the fourth section of the Donation Act, the legal title of lot 8 vested in the children and widow upon the decease of the settler, Willson. Whether the defendant is entitled to a conveyance of this title on account of the instrument given by the deceased in his lifetime to Worden, and the subsequent assignment thereof, it is not necessary now to inquire.

As to lots 3, 4, 5, 6 and 7, the question arises, whether, upon the death of a married settler, under section 4 of the donation act, who has completed the residence and cultivation required by the act and made proof thereof, but dies intestate and before a patent issues, his interest in the donation terminates, and the title to the same is vested, by said section, in equal parts in his surviving wife and children, unaffected by any sales or conveyances thereof made by him in his lifetime; or, whether said settler, being entitled to a patent upon the completion and proof of his residence and cultivation aforesaid, is not thereafter to be held and considered as a settler who could convey a fee simple in the donation, although he might die before the issue of a patent.

Upon these questions the court being divided, for the purpose of a decision of the case, the Circuit Justice is of the opinion that Willson being entitled to a patent when he conveyed to the Wallamet University, under whom the defendant holds, a decree should be entered dismissing the

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Points decided.

bill as to those lots, unless the complainant puts the plea in issue and contests the facts stated therein, within a time to be fixed by the court, and in the meantime the point of this disagreement will be stated and certified to by the judges, and entered of record. (R. S., Sec. 652.)

The plea is sustained as to lots 3, 4, 5, 6 and 7, and overruled as to lot 8. A plea to a bill in equity may be good in part and bad in part. (Story's Eq. Plead., sec. 692; *French v. Shotwell*, 5 John Ch. 562; *Kirkpatrick v. White et al.*, 4 Wash. C. C. R. 600.)

FREDERICK ADAMS v. W. P. BURKE ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 20, 1875.

1. ESTATE OF SETTLER UNDER DONATION ACT.—The Donation Act is a grant *in presenti* to the settler thereunder, subject to the conditions of residence and cultivation required by the act; and until such conditions are performed the estate granted is defeasible, but when performed it becomes indefeasible.
2. PATENT TO SETTLER.—Upon the receipt and acceptance by the commissioner of the register and receiver's certificate, the right of a settler to a patent is perfect; but such patent does not pass the estate, that having been done by the act, and is only record evidence furnished by the government for the security of the donee, of the settlement and performance of the conditions annexed to the grant, and the partition of the same, where the settler is married, between himself and wife.
3. TITLE AFTER DEATH.—Upon the death of a settler or his wife intestate, after compliance with the act and before patent issues, the estate of the intestate vests as directed by the act in the survivor and children or heirs of the deceased, but, *quere!* Do the persons in whom it vests take a new title from the government or only succeed under the act to the title of the intestate?
4. ADVERSE POSSESSION.—To render a possession adverse it must be hostile in its origin and hostile in its continuance.
5. POSSESSION WHILE RECOGNIZING ANOTHER TITLE NOT ADVERSE.—The party through whom the defendants derive whatever interest they possess in this case went into possession asserting that the title was in the United States, and the defendants, during their possession, commenced a suit in one of the State courts to compel a transfer to them of the legal title to the premises from the heirs of one Lownsdale, to whom a patent of the United States had been issued, and through whom the plaintiff traces his title, asserting in a verified complaint that the legal title

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was in such heirs and had been acquired by them by alleged settlement of their ancestor and the patent of the United States, and setting forth sundry acts and agreements by which it was contended that the heirs were bound to hold the title in trust for the defendants, and asking a decree that the heirs be declared trustees for their benefit; *Held*, that the complaint in that action, being verified, was an admission that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title in another, and an assertion of an equitable right to have that title transferred to them, and that there was therefore no such adverse possession by them as was contemplated by the statute.

Before Mr. Justice FIELD.

Action to recover land, tried by the Court without a jury.

The facts sufficiently appear in the opinion of the court.

E. C. Bronaugh, for plaintiff.

Charles B. Upton and W. T. Trimble, for defendants.

Mr. Justice FIELD. Two actions of ejectment were brought by the plaintiff, each for a portion of the demanded premises, against the tenants in possession. The landlords having appeared in both, the actions have been consolidated. The premises constitute the west half of lot four of block eighteen in the city of Portland. The plaintiff derails title to them from the children and grandchildren of Daniel H. Lownsdale, who had in September, 1852, by previous settlement upon land which includes the premises, and continued residence thereon, and cultivation, acquired a right to a patent of the United States under the act of Congress of September 29, 1850, known as the Donation Act. The defendants controvert the claim of title by the plaintiff, and assert an adverse possession of twenty years under claim and color of title, in bar of the action.

By the fourth section of the Donation Act a grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of

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December, 1851, and who was at the time a resident of the territory, or might become a resident on or before the first day of December, 1850, and who should reside upon and cultivate the land for four consecutive years and otherwise conform to the provisions of the act. The grant was of 320 acres of land if the settler or occupant was a single man, but if a married man, or if he should become a married man within a year from the first of December, 1850, then the grant was of 640 acres, one-half to himself and the other half to his wife to be held by her in her own right. The surveyor-general of the United States was required to designate the part of the land thus granted inuring to the husband and the part inuring to the wife, and enter the same on the records of his office; and the act declares that in all cases where such married persons complied with the provisions of the act so as to entitle them to the grant, whether under the preceding provisional government or subsequently, and either should die before the patent issued, the survivor and children or heirs of the deceased should be entitled to his or her share or interest in equal proportions, except where the deceased should otherwise have disposed of the same by will.

At the time of the passage of this act, Daniel H. Lownsdale was of the class of persons designated who were entitled to the benefit of its provisions; he was a settler in Oregon, and had been for years, and he was a citizen of the United States; and he was either a married man or became so within a year from the first of December, 1850. He had settled upon land now covering a large portion of the city of Portland, and he at once became a claimant under the act dating the commencement of his settlement on the twenty-second of September, 1848. This settlement was followed by his continued residence and cultivation up to September 22, 1852, the period of four years prescribed by the act. Due proof of this residence and cultivation was made to the surveyor-general and by him the land was assigned to the husband and wife in equal proportions; the east half to the husband, and the west half to the wife.

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The premises in controversy lie within the portion assigned to the husband.

In October, 1860, a patent certificate was issued in favor of Lownsdale and wife by the register and receiver of the land office in Oregon, in the usual form, and containing recitals of the claim asserted by Lownsdale of a donation right, and that proof had been made of the commencement of the settlement, and of the subsequent continued residence and cultivation required by the act. The certificate, accompanied by evidence of the facts recited, was forwarded to the commissioner of the general land office at Washington, in order that a patent might issue thereon, if no valid objection was made to it. No objection, so far as we are informed, was made to the certificate, or to the sufficiency of the accompanying evidence, and in June, 1865, a patent of the United States was issued to Lownsdale and wife, in terms granting to them the property claimed, the east half to Lownsdale and the west half to his wife. Both husband and wife died intestate, before the patent issued; the wife in April, 1854; the husband in May, 1862.

Where, as in the present case, there had been a previous settlement, the act of Congress vested the title in the settler immediately upon its passage. The act is a grant *in presenti*; its language is, that there "shall be and hereby is granted" to the settler or occupant, language which imports an immediate transfer of the interest of the grantor, not a promise to transfer that interest at a future period. But it is a grant subject to the conditions of continued residence and cultivation of four years from the settlement; if these conditions had not already been performed on the passage of the act they were to be performed subsequently. Until performed, the estate granted was defeasible; when performed, the estate became indefeasible.

When the certificate of the register and receiver was received by the commissioner, and accepted by him as satisfactory, the right of Lownsdale and of his wife to a patent was perfected. The estate as already observed passed by the act; the patent which the United States subsequently

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issued was record evidence on the part of the Government, furnished for the security and protection of the donees or their successors in interest, of the settlement of Lownsdale and of the performance of the conditions annexed to the grant, and of the due assignment to him and to his wife of their respective portions; but it had no other or greater operation upon the title. "In the legislation of Congress," said the Supreme Court in a recent case, "a patent has a double operation. It is a conveyance by the Government when the Government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as a record of previously existing rights, because it also embodies words of release or transfer from the Government." (*Langdeau v. Hains*, 21 Wall. 529.)

Upon the death of the wife in 1854, intestate, she not having previously transferred her interest, her portion of the land—that is, the west half—vested under the act of Congress in the surviving husband and her children in equal shares. No patent had then issued, and the act declares who shall in such case succeed to the estate of the deceased. Upon the death of the husband intestate, he not having previously disposed of his interest, his portion of the land—that is, the east half—vested in his children, under the act, in equal shares. The estate took this course by the express direction of the act.

But whether the children thus took a new title from the government, or only succeeded under the statute to such title as the wife in the one instance, and the husband in the other, had acquired, is one of the questions controverted in the case. The plaintiff contends that the children took a new title as donees under the statute on the death of their father, in May, 1862; and if this be the case, there can of course be no adverse possession sufficiently prolonged to bar the action. The statute requires such possession to be continued for twenty years. The defendants contend that

the children only succeeded to the estate of the deceased, and that an adverse possession commenced against him whilst living can be tacked on to the subsequent adverse holding, so as to make the statutory period of twenty years. It is not important for the decision of the present case which view of this question be correct. As the District Judge and myself have differed in opinion, in another case, upon the question whether a conveyance by a donation claimant after he had acquired by his settlement, residence and cultivation, a right to a patent and, before the patent was issued passes the estate (a decision of which would determine the question here involved), and that case will be certified to the Supreme Court, I refrain from expressing an opinion upon the point raised here. This case, as already said, can be determined without passing upon that point.

The defendants show a continuous possession of the premises, open and notorious, since 1851, but that possession has not been, in my judgment, during this period, or for twenty years, adverse to the title of the plaintiff. To render a possession adverse it must be hostile in its origin, and hostile in its continuance. The entry upon the premises must be made, and the possession must be accompanied with the claim of title against the whole world. In other words, the occupant must assert ownership in himself. An entry by permission of another, or, with an admission of another's title, will not set the statute running, and the recognition of another's title after the statute has commenced running, at any time within the twenty years, no matter for how brief a period, will destroy the continuity of the hostile possession, and avoid the bar of the statute.)

In the present case Pettygrove, the party through whom the defendants derive whatever interest they possess, went into possession not claiming title in himself, but asserting, as was the fact, that the title was in the United States; and neither he nor his grantees have at any time since pretended that the fact was otherwise, or that they have ever acquired that title. On the contrary, the defendants, one of whom, Burke, has occupied the premises by himself or tenants for the greater part of the last twenty years, instituted legal pro-

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ceedings as late as January, 1871, in one of the State courts to compel a transfer to them of the legal title to the premises from the heirs of Daniel H. Lownsdale, asserting in the complaint in the case verified by the oath of Burke, that such legal title was in the heirs, and had been acquired by their ancestor, Daniel H. Lownsdale, by the proceedings taken upon his alleged settlement and the patent of the United States; and setting forth sundry acts and agreements by which they contended that the heirs were bound to hold the title in trust for them, and asking a decree that the heirs might be declared trustees for their benefit.

That complaint is an admission of the highest character—a sworn statement—that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title, and an assertion of some equitable right to have that title transferred to them. It is too plain for argument that there was here no such adverse possession of the premises as is contemplated by the statute. If the defendants have any equities which should control the legal title, they must seek to enforce them in some appropriate form. The State court, it would seem, did not think they had any. Be that as it may, a possession with a claim of an equitable right to another's legal title to the premises, is not a possession adverse to the existence of that title; but a possession with a continued recognition of its validity.

A general finding must be had for the plaintiff, and judgment entered thereon for the possession of the premises, with costs.

RICHARD S. KNOX ET AL. v. THE GREAT WESTERN
QUICKSILVER MINING CO.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 6, 1875.

1. WHAT MATTER NOT REDUNDANT.—In a suit in equity brought for an account of the gains and profits alleged to have accrued from making and using certain inventions patented, and for an injunction against further infringement, the Court made an order staying all proceedings in the suit until the plaintiffs could bring an action at law to determine their legal rights to the alleged invention: *Held*, That reference to the suit and order of the Court in the complaint in the action at law to show the limited purpose of the action, is not irrelevant or redundant.

Before Mr. Justice FIELD.

Motion in an action at law upon a patent to strike out from the complaint as immaterial the following allegations, to wit:

“And plaintiffs further say that, on the seventh day of June, A.D. 1875, upon a motion made to that effect by the said defendant, this honorable court made an order staying all proceedings in said suit in equity until the complainants should bring an action at law to determine their said rights.

“Plaintiffs aver that they do not wish to lose their right to enjoin the use of said inventions by the defendant, and therefore do not sue for damages in this action, but bring this action to determine their rights and title to said inventions and improvements, and leave the question as to the relief to which they may be entitled against the defendant for infringements of said patents, to be determined in said suit in equity.”

M. A. Wheaton, for plaintiff.

W. W. Crane, for defendant.

Mr. Justice FIELD. The defendant moves to strike out of the complaint as irrelevant and redundant all that part which refers to the suit in equity between the same parties

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in relation to the patent and its infringement, which is the subject of the present action. That suit was brought for an account of the gains and profits alleged to have accrued from making and using the inventions patented, and for an injunction against further infringement. After the defendant had appeared and answered, and on its motion, the court made an order staying all proceedings in the suit until the plaintiffs could bring an action at law to determine their legal right to the alleged inventions. The present action was accordingly brought.

In the complaint filed no damages for the alleged infringement of the patent rights of the plaintiff are asked, and the suit in equity and the order of the court are referred to in explanation of this fact, to show that the action was instituted for the special and limited purpose mentioned. In this view, the matter which the defendant moves to have stricken out of the complaint is not irrelevant nor redundant. It shows the relation of the action at law to the suit in equity and will prevent any judgment recovered from operating as a bar to an accounting in that suit should the case presented authorize that proceeding.

If the case as stated in the bill does not authorize a Court of Chancery to decree an accounting or grant an injunction, as contended by counsel, upon the authority of *Sanders v. Logan*, 2 Fisher's Pat. Cases, 168, the defendant must urge his objection on that ground in that suit. The sufficiency of the facts there alleged cannot be considered on this application.

Motion denied.

UNITED STATES v. D. W. CHEESEMAN ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 13, 1875.

1. STATUTE REPEALED BY IMPLICATION.—Where a statute revising another act embraces the entire subject-matter of the prior act, with additional provisions, it must be regarded as a substitute for, and as repealing such prior act.
2. STATUTE REPEALED.—The act of Congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 294-7), embraces the entire subject-matter of section 2 of the act of December 25, 1862 (12 Stat. 632), and repeals the latter section.
3. LIABILITIES OF SURETIES.—The liabilities of sureties are *strictissimi juris*, and cannot be extended beyond the reasonable necessary import of the language of the bond.
4. SURETIES ON ASSISTANT-TREASURER'S BOND. — Subsequent to the passage of the act of Congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 223), the Assistant-Treasurer of the United States and Treasurer of the branch mint at San Francisco, gave an official bond in pursuance of sections 6 and 7 of the act of August 6, 1846, to provide for the reorganization of the treasury, etc. (9 Stat. 60), and conditioned in the language of said sections; also referring to the act of May 23, 1850, providing for a bullion fund (Id. 436), but not containing the conditions prescribed for stamp agents' bonds by section 170 of said act of June 30, 1864, and not making any reference to said act or duties; which bond was accepted by the Secretary of the Treasury: *Held*, that the sureties on said bond, given as assistant-treasurer and treasurer of the branch mint, are not liable for any default of their principal occurring in the performance of the duties of stamp agent, in pursuance of the provisions of said section 170 of said act of June 30, 1864.

Before Mr. Justice FIELD, and SAWYER, Circuit Judge.

The facts are fully stated in the opinion of the Court.

A. P. Van Duser, United States Attorney.

Latimer & Morrow, for defendants.

By the Court, SAWYER, Circuit Judge: This is an action on the official bond of D. W. Cheeseman, as assistant-treasurer of the United States, and treasurer of the branch mint at San Francisco.

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The eighth article of the complaint alleges, as one breach, that the principal in the bond failed to account for a certain amount of internal revenue stamps supplied him for sale by the commissioner of internal revenue of the United States under authority of acts of Congress. The defendants claim that there is no liability under the conditions of the bond and the statute, for any delinquency of the assistant-treasurer, as internal revenue stamp agent; that for this reason the deficiency alleged in article 8 does not constitute a breach in the condition of the bond, and that the matter alleged is therefore immaterial; and, on that ground, they move to strike it out in accordance with the practice under the State Code of Procedure. The bond sued on bears date July 2, 1864.

The act of August 6, 1846, provided for the appointment of assistant-treasurers of the United States at certain cities. (9 Stat. 60, sec. 5.) Section 6 provides: "That the treasurer of the United States, the treasurer of the mint of the United States, the treasurers, and those acting as such, of the various branch mints, all collectors of the customs, all surveyors of the customs acting also as collectors, all assistant-treasurers, all receivers of public moneys at the several land offices, all post-masters, and all public officers of whatsoever character, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by this or any other act of Congress, or by any regulation of the treasury department made in conformity to law; and also to do and perform all acts and duties required by law, or by direction of any of the executive departments of the Government, as agents for paying pensions, or for making any other disbursements

which either of the heads of these departments may be required by law to make, and which are of a character to be made by the depositaries hereby constituted, consistently with the other official duties imposed upon them."

Section 7 provides that all the treasurers and assistant-treasurers named in the act "shall respectively give bonds to the United States faithfully to discharge the duties of their respective offices according to law."

On July 3, 1852, "An Act to establish a branch mint of the United States in California" was passed, section 7 of which provides as follows:

"That the said branch mint shall be the place of deposit for the public moneys collected in the custom houses in the State of California, and for such other public moneys as the Secretary of the Treasury may direct; and the treasurer of said branch mint shall have the custody of the same; and shall perform the duties of an assistant-treasurer, and for that purpose shall be subject to all the provisions contained in an act entitled 'An Act to provide for the better organization of the Treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue,' approved August the sixth, one thousand eight hundred and forty-six, which relates to the treasurer of the branch mint at New Orleans."

The defendant, Cheeseman, was appointed treasurer of said branch mint, and as such gave the bond in suit. The condition of the bond follows the language of the said act of August 6, 1846, before cited, and will be set out in the course of this opinion.

It also adds "to be substituted for present bond of four hundred thousand dollars by virtue of act of May 23, 1850." (9 Stat. 436.) This act relates to a bullion fund set apart to pay for bullion received at the mint before it is coined; and provides for the increasing of bonds of treasurers to cover the increased responsibility under the operation of the act. No reference is made in the condition of the bond in suit to stamps, stamp agents, or to any other act of Congress, than those just cited.

By the act of July 1, 1862, as one source of revenue,

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Congress provided that certain merchandise and certain instruments should be stamped, with stamps to be furnished by the Government; and by section 102 the commissioner was authorized to furnish any person such stamps upon payment of the amount of duty represented by such stamps less a commission of five per cent. when the amounts taken were fifty dollars or more. It also provided for the return of such stamps so furnished, as should become unfit for use, or for which the purchaser should have no use (12 Stat. 477, sec. 102.) This act was amended December 25, 1862, by which the commissioner of internal revenue was authorized to supply the assistant treasurer at San Francisco with stamps "without requiring prepayment therefor," provided, "that no greater commission be allowed than is now provided by law"—that is to say, no greater than was allowed private parties, who received stamps upon payment, as provided in the statute before cited. (12 Stat. 632, sec. 2.)

On June 30, 1864, Congress passed another act, which covers the whole subject of internal revenue taxation, and especially that portion relating to stamp duties. Section 173 of this act repeals by direct reference nearly all the acts upon the subject, and then adds a general clause, "together with all acts and parts of acts inconsistent herewith." Section 161 of this act, like section 102 of the act of July 1, 1862, authorizes the commissioner of internal revenue to supply any person with stamps upon payment of the amount represented less commissions allowed for selling, or otherwise, and for the return of those not used; and to supply certain designated manufacturers with stamps "without prepayment therefor, on a credit not exceeding sixty days," upon "such security as he [the commissioner] may judge necessary to secure payment," etc. Section 170 provides as follows: "That in any collection district, where in the judgment of the commissioner of internal revenue, the facilities for the procurement and distribution of stamped vellum, parchment, or paper, and adhesive stamps, are or shall be insufficient, the commissioner, as aforesaid, is authorized to furnish, supply; and deliver to

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the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable quantity or a amount of stamped vellum, parchment or paper, and adhesive stamps, without prepayment therefor, and shall allow the highest rates of commissions allowed by law to any other parties purchasing the same, and may in advance require of any such collector, assessor, assistant treasurer of the United States or postmaster, a bond with sufficient sureties, to an amount equal to the value of any stamped vellum, parchment or paper, and adhesive stamps, which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required of all quantities or amounts undisposed of, and for the payment monthly, of all quantities or amounts, sold or not remaining on hand. And it shall be the duty of such collector to supply his deputies with, or sell to other parties within his district who make application therefor, stamped vellum, parchment, or paper, and adhesive stamps, upon the same terms allowed by law, or under the regulations of the commissioner of internal revenue, who is hereby authorized to make such other regulations, not inconsistent herewith, for the security of the United States and the better accommodation of the public, in relation to the matters hereinbefore mentioned, as he may judge necessary and expedient. And the secretary of the treasury may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such stamped vellum, parchment, paper and adhesive stamps." (13 Stat. 297, sec. 170.)

These are the only statutes brought to the attention of the Court bearing upon the question presented by the motion to strike out. The bond in question was given after the passage of the last named act of June 30, 1864. This act clearly operated as a repeal of the act of December 25, 1862, although the latter act is not specifically referred to in the repealing clause. But the latter embraces the entire subject-matter of the prior act on this subject, making changes on the point in question and adding other provis-

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ions, and was manifestly intended as a substitute for it. In such cases it is well settled that the operation of the later act is to repeal the one for which it is substituted. (*Murdock v. City of Memphis*, 20 Wall. 617; *United States v. Tynen*, 11 Wall. 88; *Henderson's Tobacco*, 11 Id. 652; *Bartlett v. King*, 12 Mass. 537; *Commonwealth v. Cooley*, 10 Pick. 36; *Pierpont v. Crouch*, 10 Cal. 315; Sedg. on Stat. 126; *Butler v. Bicknall*, 11 Int. Rev. Record, 30; *Norris v. Crocker*, 13 How. 438.) The act of 1862, therefore, need not be considered.

The liabilities of sureties cannot be extended by implication or construction. The surety cannot be bound beyond the scope of his engagement. He is entitled to stand upon the strict terms of his contract. His liability is *strictissimi juris*, and cannot be extended beyond the reasonably necessary import of the language of his bond. (*Miller v. Stuart*, 9 Wheat. 703; *United States v. Boyd*, 15 Pet. 207-9; *Legget v. Humphreys*, 21 How. 76; *Morton v. Thomas*, 24 How. 317; *Smith v. United States*, 2 Wall. 235.)

Is the default alleged in article 8 of the complaint fairly within the terms of the condition of the bond? The condition of the bond is in the language of the act of 1846, which was passed long before there was any act relating to stamps in force. One of the conditions is in the language of section 7 of said act that the principal "shall truly and faithfully continue to execute and discharge all the duties of the said office according to the laws of the land." These duties were specifically defined by section 6 of the same act, and another condition of the same bond follows substantially the language of that section, and is, that "he shall truly and faithfully continue to execute and discharge all the duties of the said office, according to the laws of the United States, and moreover has well, truly and faithfully kept and shall well, truly and faithfully keep safely without loaning, using, depositing in bank or exchanging for other funds than as allowed by the act of Congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered by the proper

department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make the same as directed, and has done and shall do and perform all other duties as fiscal agent of the Government, which have been or may be imposed by any act of Congress, or by any regulation of the treasury department made in conformity to law; and also has done and performed, and shall do and perform all acts and duties required by law, or by direction of any of the executive departments of the Government, as agent for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by the law to make, and which are of a character to be made by a depository constituted by an act of Congress, entitled 'An Act to provide for the better organization of the treasury, and for the collection, safe keeping, transfer, and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him; then this obligation to be void and of none effect," etc.

The language of the statute and of the condition is very broad, but the words must be taken as having reference to such duties only as have some natural relation to the ordinary duties imposed upon the particular officer, who gives the bond. The language prescribing the duties is the same for "all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters and all public officers of whatsoever character." All these officers are provided for in the same section. It can hardly be supposed that Congress intended that the words "all other duties as fiscal agents of the Government which may be imposed by this or any other act;" in the section prescribing the duties of the officers mentioned and which is inserted in the treasurer's bond, in suit, should include the duties of collectors of customs, receivers of land offices and postmasters in case Congress should, after giving the bond,

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see fit to impose the duties of such officers on the assistant treasurer.

If so, then the duties of all officers, who have anything to do with the moneys of the Government, might be imposed on an assistant treasurer, and the liabilities of his sureties extended far beyond anything contemplated at the time of the execution of the bond. We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers as usually devolved upon them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of Government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers. Thus the duties of treasurer are usually to keep safely, and pay out upon lawful authority the public moneys, not to act as collectors of customs, postmasters, receivers of land offices, or other officers engaged in collecting the different branches of the public revenues. Treasurers are ordinarily understood to be keepers of the public funds collected by other classes of public officers to whom those specific duties are specially assigned. We do not think the words of the treasurer's bond under consideration would cover the duties of collectors of customs, etc., imposed by act of Congress or a regulation of the treasury department after the giving of the bond. The sale of stamps required by act of Congress to be used upon certain specified merchandise and written instruments, is one mode of raising and collecting revenue; and the furnishing of stamps to the assistant treasurer for sale to other parties in pursuance of section 170 of the act of 1864, is but making him an agent for the sale of stamps, and collection to the extent of sales of that branch of the public revenue. The stamps themselves are not money. There is no natural or necessary connection of this service with the ordinary duties of that officer, as treasurer. The service is more appropriate to other officers, whose duties are

to collect revenue, and it was at first imposed on that class of officers. Section 102 of the act of July 1, 1862, as has been seen, authorized the commissioner to "supply collectors, deputy collectors, postmasters, stationers and other persons (without naming assistant treasurers), at his discretion with adhesive stamps," etc., "upon payment at the time of delivery" of the amount of duties "said stamps represent;" and to allow five per cent. as commission, providing also for a return of such as were not used. Section 161 of the act of June 30, 1864, made a similar provision as to similar parties, the supply to be made upon payment, and, also authorized the delivery of stamps to certain manufacturers, without payment upon giving satisfactory security for payment within sixty days. Section 170 of the same act authorized the commissioner of internal revenue in those districts where in his judgment the facilities for distribution of stamps were insufficient, to furnish to the collector and assessor of the district, and to any assistant treasurer, or any postmaster, a suitable quantity of stamps "without payment therefor," and to allow the highest rates of commission allowed other parties purchasing the same; and provided that the "commissioner may in advance require of any such collector, assessor, assistant treasurer of the United States, or postmaster, a bond with sufficient sureties to an amount equal to the value of any stamped vellum, parchment or paper and adhesive stamps which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts sold or not, remaining on hand."

Thus it will be seen that under section 161, the stamps were to be supplied to certain officers and persons only on prepayment of the amount represented by the stamps, less commissions, to certain manufacturers on credit upon giving security, and under section 170 they might be supplied for sale on similar commissions to certain officers named without prepayment, in the discretion of the commissioner, but he was authorized to require security and the condition of the bond is prescribed. Some of the officers mentioned in both sections are the same, as postmasters and collectors.

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It seems to be a fair inference from these sections that Congress intended that there should be in all cases either prepayment of the value less commissions, or special security given for the faithful performance of this particular duty.

Why require prepayment of collectors and postmasters in section 161, if their official bonds as collectors and postmasters already given covered the duty? or why authorize the supply of stamps to these same officers in section 170 of the same act, and require other special security, if it was contemplated that their bonds as collectors and postmasters already given protected the government? These officers, like assistant treasurers, give bonds for the faithful discharge of their duties which are prescribed by section 6 of the act of 1846. If the assistant treasurer's bond under that act covers the liabilities by reason of the provisions of section 6, the same must be true of the collectors' and postmasters' bonds. It seems very evident to us that Congress intended that the specific bond authorized by section 170 of the act of 1864 should be given to cover the specific duty devolved upon the stamp agents provided for in that section, that is to say, when stamps are delivered without prepayment. The language is not that an "additional" bond shall be required, but that "a bond with sufficient sureties" may be required. If Congress had contemplated that a bond as assistant treasurer should cover this duty, there would have been no need of this bond, or if it had supposed the bond already given insufficient, it would naturally have authorized an additional bond as in case of the bullion fund with a condition covering all duties instead of limiting the responsibility to that particular duty. The bond in question was given after the passage of the act of 1864, yet it does not contain the condition prescribed by section 170 to cover the duties of the assistant treasurer as stamp agent, and makes no reference to it. It does, however, refer in terms to the act of 1846 and to the act of 1850 relating to a bullion fund, and purports to have been executed in pursuance of those acts. It seems to refer specifically to all duties intended to be covered. *Expressio unius est exclusio alterius*. The parties executed the bond, and the secretary of the treasury

accepted it in this form. If it was intended to cover the duties of the assistant treasurer, as stamp agent under the act of 1864, it is reasonable to presume that the secretary of the treasury would have required the conditions prescribed by section 170 to be inserted, or at least to have required some reference in the bond to those duties, or to that act. The secretary prescribes the form of the bond.

We think the reasonable conclusion is, that Congress intended to require a distinct and separate bond containing the conditions prescribed in section 170 of the act of 1864, to cover the duties of stamp agents provided for in that act; that as the bond in suit was given since the passage of the act of 1864, and does not contain the conditions prescribed by that act, and makes no reference to the act, but only refers to the acts of 1846 and 1850, the sureties might have reasonably supposed, and were entitled to suppose, that another bond would be given to cover the service of stamp agent, should the commissioner exercise his discretion, and require that service of the person acting as assistant treasurer, and that their liabilities upon the bond were limited to the duties of assistant treasurer and treasurer of the mint, and such duties as usually pertain to that office, and as they existed under prior acts of Congress; and that they are not liable on the bond in suit for the delinquencies set out in article 8 of the complaint.

The result is that the averments of said article are immaterial, and should be stricken from the complaint, and it is so ordered.

LAURA S. HALL ET AL. v. HENRY S. DEXTER ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 13, 1875.

1. ENTRY ON LANDS AFTER ACTION COMMENCED.—*Prima facie*, all parties entering upon land after suit in ejectment brought for its recovery, are in possession in subordination to the defendant, and are equally liable to be removed by the writ issued upon the judgment recovered against him.
2. SAME.—EFFECT OF JUDGMENT.—But parties thus entering after suit brought by title existing previously, adverse to that of the parties, are not affected in their rights by the judgment recovered.

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3. **MARSHAL HAS NO JUDICIAL POWER TO DETERMINE TITLE.**—The determination of the question whether parties thus entering have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant.
4. **MARSHAL MAY REQUIRE INDEMNITY BOND.**—When such a party claims to have a title anterior to the suit the marshal may require from the plaintiff a bond of indemnity before proceeding to remove the party from the premises, or give a reasonable time to the party to apply to the court for a modification of the writ so as to exclude him from its operation. Upon such application the Court may stay the enforcement of the writ or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal is only discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants.
5. **TAX SALE AFTER SUIT BROUGHT.**—A party asserting title under a tax sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation.

Before Mr. Justice FIELD.

The facts sufficiently appear in the opinion of the Court.

Philip G. Galpin, for plaintiff.

Charles L. Low, for defendant.

Mr. Justice FIELD. In November, 1867, the plaintiff recovered judgment for the possession of the premises in controversy, which are situated in the city of San Francisco. In 1873 the judgment was affirmed by the Supreme Court, and on filing its mandate in the Circuit Court in June last, a writ for the possession of the premises was issued to the marshal of the district.

The writ directs that officer to place the plaintiff in the quiet and peaceable possession of the premises, but he refuses to execute it on the alleged ground that the person occupying the premises is a tenant under a party claiming to own them by a deed executed upon a sale for unpaid taxes made since the recovery of the judgment. The plaintiffs having tendered a bond of indemnity to the marshal, prays

that he be directed to proceed to enforce the writ, and be punished for refusing to obey its command. The refusal of the marshal is not made in any contumacious spirit, but from a desire to avoid the commission of a possible wrong to the contestant.

A judgment in ejectment binds as to the title only parties to the action, and parties claiming under them. But *prima facie* all parties entering after suit brought are in possession in subordination to the defendant, and are liable to be removed equally with him by the writ. No alienation or abandonment by him of the premises, and the entry by another, with or without his assent, not having a title antedating the commencement of the suit, can prejudice the plaintiff in his recovery. This doctrine is established to prevent collusive transfers from defeating the action.

Persons entering after suit by title existing previously adverse to that of the parties, stand in a different position. Their title is in no respect affected by the judgment. But the determination of the question whether parties thus entering into possession have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant. The most that he can do when such a party claims to have a title anterior to the suit, is to require from the plaintiff a bond of indemnity, or give a reasonable time for the party to apply to the court for a modification of the writ, so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ, or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal will only be discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants. A party asserting title under a tax-sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation.

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There is here no application of the purchaser of the tax title, and from the facts disclosed in the affidavits, it is by no means clear that the entry of his tenant was not by the assent of the tenant of the defendants. There is nothing in the objection that the description of the premises in the writ is uncertain, and if the fees of the marshal have not been tendered as asserted, he may require their payment before proceeding further.

It appears that the time for the return of the writ already issued has expired; but this opinion will serve as a guide to the officer, on the issue of an alias writ.

JAMES T. KIELLEY v. BELCHER SILVER MINING CO.

CIRCUIT COURT, DISTRICT OF NEVADA.

SEPTEMBER 20, 1875.

1. MASTER AND SERVANT. — A servant takes upon himself the ordinary risks and perils of the service in which he voluntarily engages.
2. IDEM.—These ordinary risks include all such as, arising out of the nature of the work, happen notwithstanding the exercise of due care, and, also, those arising from the negligence of those of his fellow-servants, who are engaged in the same department of the master's general business, and who are not his superiors in authority.
3. IDEM—FELLOW-SERVANTS.—The rule which exempts the master from liability for injuries caused by one fellow-servant to another, does not extend to the case of servants serving in distinct departments of the master's general business.

Before Mr. Justice FIELD, and HILLYER, District Judge.

This is a demurrer to the complaint in a suit to recover damages for personal injuries. The complaint states that the defendant is, and was, a corporation carrying on the business of mining in Storey county; that the plaintiff was employed by the defendant as a laborer in its mine; that, at the same time, a large number of miners were also employed by the defendant, whose duty it was to excavate in the mine by means of blasts exploded at irregular intervals; that these blasts threw rock and earth in all directions with sufficient force to do great bodily injury to and kill a person

struck thereby; that such blasts were put up in and exploded by the said miners; that all persons approaching a blast about to be exploded could have been notified easily thereof and warned of the danger, "and it was the duty of the defendant so to do; but not regarding its duty in this respect, it neglected to give plaintiff notice, but carelessly and negligently allowed him, whilst engaged in the employment and discharging his duty in the said mine, to approach so near a point where a blast had been put in by the said miners, employees of defendant, that when the same was exploded by the said employees, this plaintiff was, by reason of the concussion and the rock and earth thrown therefrom striking him in the face and upon the body, greatly injured, his eyesight being permanently destroyed, and he receiving other serious injuries."

The point raised by the demurrer is, that the plaintiff and the persons exploding the blast were fellow-servants, engaged in a common employment, though in different branches, and the defendant is not liable to plaintiff for any negligence of his fellow-servants, nor from any injury springing therefrom.

Lewis & Deal, for plaintiff.

Whitman & Wood, for defendant.

By the Court, HILLYER, J. That the defendant, as a corporation carrying on the business of mining, is liable for torts is well settled. (*Fowle v. Com. Coun.*, 3 Pet. 490.) And since, as such corporation, it can act by means of agents or servants only, it follows that it is liable to third persons for the tortious acts of its agents and servants. But the servants of a corporation are no more and no less than the servants of a natural person, and in both cases whatever is negligently done or omitted is, as to the public, the employer's act (14 How. 468). It is also established law that a master is responsible to his servant for an injury caused by his (the master's) own negligent act. If, then, a corporation can, as master, be directly guilty of a tortious act to the injury of its servant, it is good pleading to charge

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the injury, as the plaintiff has done in this case, to be the result of the negligence of the corporation itself, and this consideration might dispose of the demurrer adversely to the defendant. But the argument for the defendant, as we understand it, goes further, and asserts that the defendant, being a corporation, and incapable of acting except through the agency of servants, the complaint shows upon its face, sufficiently, that the negligence was that of a fellow-servant, for which the plaintiff has no remedy; in accordance with what is stated to be the settled rule of law in this country and in England, namely: that a master is not liable to his servant for the negligence of a fellow-servant while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault. (Shearman & Redfield on Negligence, 101, sec. 86.)

The doctrine of law which holds a master responsible for the acts of his servants is embodied in the maxims, *qui facit per alium, facit per se*, and *respondeat superior*, the former being generally applied in matters of contract, the latter in matters of tort. The maxim *respondeat superior* proceeds upon the principle that the wrongful act of the servant, done in the course of his employment, is in contemplation of law, the act of the master himself. And the principle is founded upon public policy and convenience. The master chooses his servant, and directs and controls him in his work. It is the master who is doing the work, through the instrumentality of a servant. There is obvious justice in holding him responsible for injuries done by his servants while so engaged, otherwise, the master might carry on the most hazardous enterprises through the medium of careless and practically irresponsible servants, without liability for injuries caused by such servants to third persons, and, so, these latter be left virtually without redress. The master—the real cause of the injury in such cases—would so be allowed to take advantage of his own wrong, in violation of another established legal principle. The maxim, then, which permits the injured party to obtain redress from the real author of the wrongful act is founded in wisdom. This is the plain and undoubted rule of law, when the injury is

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received by a stranger. When, however, the injury is done by one fellow-servant to another, an exception to the general operation of the maxim, has been made. It is upon this exception that the defendant relies to defeat plaintiff's action.

This exception is firmly established in England, and in the United States the general, though not universal, current of authority is with the English courts. Whether the rule, as quoted above, embracing this exception, is law, to the extent claimed, is a question new in this Court, and one which has never been directly passed upon by the Supreme Court of the United States. But the language of the latter court, in two recent cases, shows plainly that the rule is considered open for argument, consideration, and possible qualification. (*Packet Company v. McCue*, 17 Wall. 508; *Railroad Company v. Fort*, 17 Id. 553.) In the case of *Fort*, the court, speaking on the general proposition embraced in the rule, said: Whether it be true or not, we do not propose to consider, because, if true, it has no application to this case. Yet the case was one in which a youth of sixteen, being employed in a machine-shop of the company, lost his arm while obeying a direction of Collet, under whose superintendence he was, to ascend a ladder and adjust a belt. Indeed, this case cannot be reconciled with the more extreme English and American cases, and must be considered as in some degree a modification of the rule relied upon by the defendant, which exempts the master, though the servants are employed in different branches of the common business or are of different grades, the servant injured being under the authority of the one causing the injury. The highest courts of Ohio, Kentucky and Wisconsin have either rejected this rule entirely, or modified it so as to exclude from its operation cases where the servants are in different departments of the common business, or the servant causing the injury is in authority over the injured servant. (*Railroad Company v. Keary*, 3 Ohio Stat. 201; *Railroad Company v. Denning*, 17 Ohio Stat. 197; *Railroad Company v. Collins*, 2 Duvall, 114; *Chamberlain v. Railroad Company*, 11 Wis. 238) In *Dixon v. Rankens*, the Court of

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Session of Scotland wholly denied the rule, as entirely unreconcilable with legal reason. (1 Am. Railway Cases, 569.) In Pennsylvania, two of the five judges, and in South Carolina three of the ten judges dissent from the leading decision affirming this rule. (*Ryan v. Railroad Company*, 11 Harris, 384; *Murray v. Railroad Company*, 1 McMullan, 387.)

In a case decided in 1867, the Supreme Court of Connecticut, while accepting the rule upon the authority of former adjudications, use this language in reference to the policy upon which it is said to be founded: "With respect to considerations of policy, it is by no means certain that the public interest would not be subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer by it. A principal is responsible to an employee for his own negligence; why should he not be liable for that of his agent, over whom the employee has no control and of whom he may have no knowledge." (*Burke v. Railroad Company*, 34 Conn. 474. See also, *Waller v. Railroad Company*, 2 H. & C. 111, in note.)

In the present state of judicial decision inquiry may, without presumption, be made whether and how far the rule is or is not true; especially when we remember that it is of recent origin—is, in fact, an exception ingrafted upon an ancient maxim of the common law, from considerations of public policy and convenience, as the rule best calculated to protect the rights and secure the safety of all between whom the social relation of master and servant exists.

On looking into the decisions which support the rule, we find they proceed upon the theory that there is an implied condition in every contract of service that the employee takes upon himself all the ordinary risks of the service, including the negligence of his fellow servants, and that in consideration of assuming such risks the servant receives increased compensation.

The justice and policy of this are maintained by these arguments: That these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master; that they are perils which can be as distinctly foreseen and provided for in the rate of compensation as any others; that where several persons are employed in one common enterprise, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require; that if we are to teach each agent that for the negligence of others resulting in an injury to himself he can grasp the treasures of his principal, he ceases his vigilance over those with whom he works—a bribe is held out to him to incur personal risks which he may have facilities to render partially harmless to him, but which may carry destruction to others; and, finally, that the safety of all will be better secured by enforcing the rule than by giving the servant his action against his master. (*Furwell v. Railroad Corporation*, 4 Met. 49; dissenting opinion of Spaulding, judge, in *Stevens v. Railroad Company*, 20 Ohio, 150.) This reasoning will not support the rule, unless the general terms “fellow-servants” and “common employment” are taken in a restricted sense. The rule requires us to imply certain terms not expressed by the parties to be part of the contract of service, and the question is, how far considerations of public policy and convenience authorize courts to go in that direction.

That every servant takes upon himself the ordinary risks and perils of the service he undertakes, must be admitted as a rule founded in justice and sound policy. That these ordinary risks include all such as are liable to happen in the performance of the work he engages to do, although he and his fellow-servants discharge their duty and exercise due care is also clear.

Nor will it be denied that, if the servant has contracted

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to serve in any specified branch or department of his master's general business, he assumes the risks arising from the negligence of those of his fellow-servants, not his superiors in authority, who are engaged in the same department, whose conduct he has an opportunity of observing, and, against the consequences of whose negligence he can thus, to some extent, protect himself by the exercise of his own care and prudence. But it seems apparent that any rule which goes further, and throws upon the servant any risks other than those which are the natural and ordinary incidents of the work he agrees to do, and which he might fairly anticipate as liable to accompany his undertaking, is unjust and indefensible. Such a rule, we think, is the one in question, when so construed as to include in the term "fellow-servants engaged in a common employment" all who are employed by the same master, though laboring in distinct and separate departments of his business. Carried to this extent, the rule relieves the master of a responsibility which justice and policy alike require he should bear. Among the duties and obligations arising out of the relation of master and servant, the law regards that of the master to provide for the safety of the men in his employment as the first and highest. It is peculiarly so where, like that of mining, the business is hazardous. This obligation includes the exercise of due care in the selection of all who are to act for him, and requires him at least to see to it that those who labor in one department of his business are not injured by his chosen servants in another. Unless this is so, there is no adequate protection to the laborer against his employer's negligence; for the workmen in one department, having no authority over those in another, nor any opportunity of observing or influencing their conduct, or of guarding themselves by their own care and prudence, are defenseless save through the watchful care of the master, which can be secured only by throwing upon him the responsibility of seeing that each department of his business is conducted with due care. It is assuming the whole question—as to the reason, justice and policy of exempting the master from liability in such cases—to say that such

exemption is implied from the contract of service; for unless the exemption is demanded by reason and sound policy, it ought not to be implied.

The defendant is a corporation engaged in mining. From the trustees down to the lowest grade of its employees, all are engaged in one common object: namely, obtaining gold and silver from the mine. In a general sense, they are all fellow-servants engaged in a common service. Yet, no court, it is believed, has gone so far as to say that all these are fellow-servants within the rule contended for here by the defendant. If the defendant negligently provides insufficient machinery, the negligence is necessarily that of some one of its servants; yet, all the courts agree that it may be liable to one of its servants for such negligence. So, if there is neglect in selecting a servant, it must be the neglect of some servant of the corporation; yet, there is no doubt that the corporation is liable, if, from such neglect, injury results to a fellow-servant. In these cases, the servant injured, and the one guilty of negligence, are not regarded as fellow-servants within the rule. Hence, it cannot be truly said that the servant, by his contract of service, impliedly takes upon himself the risk of injury from the negligence of all who, in a general sense, are his fellow-servants. As between some who, in common speech, are properly enough called fellow-servants, the master's liability attaches; as between others, it does not. Who are to be considered fellow-servants, engaged in a common business, within the rule is, in some degree, an open question in each case, to be determined by the facts of the particular case. But there should be some established principle to guide us in determining that question, and it ought to rest on sound reasoning. The principle which lies at the foundation of the master's exemption in any case, is this: That the servant, having voluntarily entered into a contract of service to do a specified work for a specified compensation, has thereby accepted the ordinary perils incident to doing that work; and whenever the negligence of another employee of the same master can be considered an ordinary risk, one which he might reasonably anticipate at the time of making

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his contract, he accepts also the perils liable to happen through such negligence. And it seems clear that upon this principle, those only are fellow-servants for whose negligence, one to another, the master is exempt, who serve in such capacity and in such relation to the master and each other, that the means of the servants to protect themselves are equal to, or greater, than those of the master to afford them protection; and that further than this justice and policy forbid us to carry the implied portion of the contract of service. Beyond this an injured servant has as clear title to relief against the master as a stranger, upon the maxim *respondeat superior*. Such cases as that of Ford, in 17 Wallace, and *Ford v. Railroad Company*, 110 Mass. 240, with many others, show that the contract of service is not presumed to regulate all the rights and duties of the parties. Under various circumstances, the master has been held liable to one servant for the negligence of another, notwithstanding the privity of contract. In such cases the master's liability attaches, not by virtue of his contract, but upon the maxim *respondeat superior*, which maxim our Supreme Court has said is of "universal application," and "wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master." (*Railroad Company v. Derby*, 14 How. 468.)

Regarding the case at bar in the light of the conclusions thus reached, the complaint states a good cause of action, and it is not enough to defeat it that the negligence charged must have been that of some servant of the defendant employed in the same general business with the plaintiff. To defeat the action it must appear that the plaintiff and the person whose negligence caused the injury were fellow-servants within the principles announced in this opinion.

The demurrer is overruled.

**J. P. KNARESBOROUGH v. BELCHER SILVER MINING
COMPANY.**

DISTRICT COURT, DISTRICT OF NEVADA.

SEPTEMBER 20, 1875.

1. PLEADING IN SUITS FOR PERSONAL INJURIES.—In a suit to recover damages for injuries caused by a defective platform, it was alleged that the defendant provided the platform negligently, without any averment either that plaintiff was ignorant of the defect, or that it was known to defendant: *Held*, that the complaint was sufficient, and that knowledge on the part of plaintiff was a circumstance to convict him of concurring negligence, and proof of it should come from the defendant.
2. IDEM—NEGLIGENCE.—Knowledge on the part of defendant is an ingredient of negligence, and may be proved under the general allegation of negligence.

Before Mr. Justice FIELD, and HILLYER, District Judge.

The plaintiff sues for injuries received while in defendant's employment. The injuries were caused by a defective floor or platform upon which he was at work, and it is alleged in the complaint that the defendant provided this insecure and defective platform negligently. There is no allegation in the complaint that the plaintiff did not know, or that the defendant did know, that the floor was defective and insecure.

To this complaint a demurrer is filed for two causes. First. For the want of an allegation of knowledge on the part of defendant, and a want of it on plaintiff's part that the floor was defective. And, second, because the injury, if any, resulted from the negligence of plaintiff's fellow-servants.

Lindsay & Dickson, for plaintiff.

Whitman & Wood, for defendant.

By the Court, HILLYER, J. That the plaintiff is not, in making out his case, required to show a want of concurring negligence on his part, is settled by the Supreme Court in *Railroad Company v. Gladmon*, 15 Wall. 401. The Court

there say: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law, the burden of proof on that point does not rest upon the plaintiff." Knowledge on the part of plaintiff that the platform was defective and unsafe is clearly a circumstance tending to convict him of concurring negligence, the proof of which, upon the authority cited, rests upon the defendant. It was therefore unnecessary to allege a want of knowledge on his part.

As to the want of an averment of knowledge on defendant's part, if such knowledge is a fact, without proof of which the plaintiff cannot establish the charge of negligence, then it should be averred. If, however, the defendant may be convicted of negligence, though ignorant of the defects in the platform, then the complaint is sufficient, and the question of defendant's knowledge, or want of it, is important as a matter of evidence only, in proof of the essential fact, which is the negligence.

That the latter proposition is the true one, appears both by the weight of authority and reason. In cases like the present, knowledge is regarded as an ingredient of negligence, which may be proved under an allegation of negligence. It was so held upon demurrer, in *Byron v. Telegraph Co.*, 26 Barb. 39. If a master's personal knowledge of defects in his machinery is necessary to his liability, says Mr. Justice Byles, the more a master neglects his business and abandons it to others, the less will he be liable. * * * But knowledge is only an ingredient in negligence. (*Clark v. Holmes*, 7 H. & N. Ex. 937.) Knowledge is only a fact in the case, to be considered by the jury with the other circumstances in determining on the one hand whether the defendant has been guilty of negligence, and on the other whether the plaintiff has been guilty of contributory negligence. But in neither case is such knowledge necessarily conclusive on the point. (*Id.*, and *William v. Clough*, 2 H. & N. 258.) To the same effect is the case of *Ford v.*

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Railroad Co., 10 Mass. 240. Speaking of knowledge on defendant's part, the court said: "The question was not whether the officers named knew or might have known of the defect, or of the incompetency of those who had charge of repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use. Upon this point we think the demurrer is not well taken.

The second cause of demurrer alleged is, that the injury, if any, resulted from the negligence of plaintiff's fellow-servants. In the case of *Kielley* against the same defendant, this point was discussed at some length at this term, and the conclusion reached that the doctrine contended for by the defendant was not law. It was this: That the defendant, being a corporation, and unable to act otherwise than by means of servants, all persons employed by it in the same general business must necessarily be fellow-servants, within the rule exempting the master from liability for the negligence of one servant to another. It is unnecessary to discuss the point in this case, or do more than refer to what was said by the court in *Kielley's* case.

The demurrer is overruled.

THE GIANT POWDER COMPANY v. THE CALIFORNIA POWDER WORKS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 22, 1875.

1. ORIGINAL PATENT FOR PROCESS.—Where the specifications in a patent particularly describe four different modes of exploding nitro-glycerine: 1. By exploding gunpowder confined in a waterproof tube in contact with it; 2. By an electric spark or current; 3. By inserting in the liquid a thin case containing some substance evolving heat; 4. By a fuse; and claimed as his invention "the use of nitro-glycerine or its equivalent substantially in the manner and for the purposes described:" *Held*, that the patent is for a process and not for a compound. (Per Mr. Justice FIELD.)
2. RE-ISSUE FOR COMPOUND.—The original patent having been surrendered, there were re-issues in several divisions; one for a compound of

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- nitro-glycerine and gunpowder ; one for a compound of nitro-glycerine and gun-cotton ; and one for a compound of nitro-glycerine and rocket powder : *Held*, that each of these re-issues is a patent for a compound, not for a process. (Id.)
3. RE-ISSUES VOID.—The original patent being for a process and the three re-issues mentioned being for compounds, they were not embraced in the invention originally described and patented, and the re-issues are void. (Id.)
 4. RE-ISSUE, WHEN AUTHORIZED.—Under section 53 of the act of 1870, (16 Stat., 205) a re-issue is not authorized unless the original patent is inoperative or invalid from a defective or insufficient specification, or the claim of the patentee exceeds his right. (Id.)
 5. SAME.—MACHINE PATENTS.—In determining the propriety of a re-issue no new matter can be introduced except in cases of machine patents. (Id.)
 6. RE-ISSUE OF PATENTS OTHER THAN FOR MACHINES.—If the patent does not relate to a machine, the specification, if defective, may be made more definite and certain, so as to embrace the claim made, or the claim may be so modified as to correspond with the specification ; but this is the extent to which modifications can be made in such cases. (Id.)
 7. NOBEL'S ORIGINAL PATENT was neither inoperative nor invalid by reason of any defect or insufficiency of the specifications of the patent set out in the statement of the case. The specification was unambiguous and covered all that was claimed ; but, if otherwise, no new matter not relating to the process claimed, but relating to compounds made by uniting nitro-glycerine with other substances, could be added to the specifications. (Id.)
 8. RE-ISSUES UNDER THE STATUTE must be for the same invention which was embraced in the original patent, or if re-issued in divisional parts, each division must be for some distinct and separate part of that invention. (Id.)
 9. CHANGE OF SPECIFICATIONS AND RE-ISSUES.—Where the inventor originally filed specifications embracing both compounds and cognate processes, but afterwards filed amended specifications omitting the compounds, and the patent issued upon the amended specifications which were alone attached thereto, upon an application for re-issues in divisions, the commissioner of patents is limited in his re-issues to the invention embraced in the amended specifications attached to the original patent, and cannot look at the specifications first filed, and afterwards abandoned, to ascertain what the invention sought to be patented was. (Id.)
 10. RE-ISSUE OF A RE-ISSUE.—Where a patent is surrendered and a re-issue obtained, a second re-issue on surrender of the first, must be limited to the invention embraced in the first re-issue. (Id.)
 11. CONSTRUCTION OF ORIGINAL AND RE-ISSUED PATENTS.—Where upon a comparison of the original and the re-issued patents, it appears upon the face of the patents that the latter is not for the same, or some part of the same invention as that embraced in the former, it

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will be adjudged void on the ground that it was issued without authority. (Id.)

12. RE-ISSUES UNDER ACT OF 1836.—On an application for a re-issue of a patent under the Act of 1836, the commissioner was not authorized to look beyond the patent as originally granted with the specifications and diagrams thereto annexed, and the models deposited in the patent office, for the purpose of ascertaining what invention was intended to be patented. (Per SAWYER, Circuit Judge.)
13. NOBEL'S PATENT WITHIN THE RULE.—Nobel's patent having been issued in 1865, his rights accrued and they must be determined under the provisions of the act of 1836, and there being no model, upon an application for a re-issue made prior to the passage of the act of 1870, he would be limited in the re-issue to the invention as described, substantially indicated or suggested in the original patent, and the specifications and drawings appended thereto.

Before Mr. Justice FIELD, and SAWYER, Circuit Judge.

Demurrer to bill to enjoin the infringement of a patent. In addition to the facts stated in the opinion of the court the following bearing upon the points decided were alleged in the bill:

Alfred Nobel on the sixteenth day of September, A. D. 1865, duly filed in the United States patent office an application for a patent addressed to the commissioner of patents, praying for letters-patent for his invention; and with said petition said Nobel filed in said patent office a power of attorney appointing and constituting Henry Howson his attorney and agent to alter and modify the specifications and drawings in his said application, to receive the patent, etc. With said application for a patent, said Nobel duly filed his specifications and drawings describing his invention, a copy of which specifications and drawings marked "Exhibit A" is made a part of the bill. That part of the specifications set out in "Exhibit A" necessary to illustrate the points of the decision is as follows, to-wit:

"EXHIBIT A.

"Memorandum, relating to Alfred Nobel's invention for the use of nitro-glycerine and analogous substances as substitutes for gunpowder.

"There is a class of substances long known, but not applied as yet to technical purposes, in consequence of prac-

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tical difficulties in promoting their explosion; such are nitro-glycerine, the nitrates of ethyl and methyl, nitromanite, etc.

“The peculiar property which distinguishes this class of substances is that fire may be applied to them without their exploding. Thus nitro-glycerine, if ignited in an open space, is slowly decomposed with a bluish flame, but the fire goes out when the match is withdrawn; hence nitro-glycerine cannot, under ordinary circumstances, be looked upon as a ready explosive agent, for while gunpowder and other explosive substances hitherto used, always explode when fire is set to them, nitro-glycerine, on the other hand, and analogous substances, must be heated to the degree of their detonation in order to explode. If a drop of nitro-glycerine is poured upon an anvil, the blow of a hammer, through the heat developed by compression causes it to explode, but only that part which has received the blow, so that the explosion in this case is only a local one.

“A chief point in my invention consists in overcoming this difficulty. According as nitro-glycerine is to be used for firearms or for blasting, I adopt two different methods for promoting its explosion, viz:

“1. By mixing it with gunpowder, gun-cotton, or any other substance developing a rapid heat, nitro-glycerine being an oil, fills the pores of gunpowder and is heated by the latter to the degree of its explosion. Gunpowder treated in this way can take up from ten to fifty per cent. of nitro-glycerine, and develops a greater power with a lesser quickness of explosion. Where the only object in view is to reduce the quickness of explosion of gunpowder, I mix it with or make it absorb common non-explosive oil from one to ten per cent. of its weight.

“2. When nitro-glycerine is to be used for blasting, where quickness of explosion is of great importance, I submit it to the most rapid source of heat known, viz., that developed by pressure. To effect this I make use of the pressure developed by heating a minute portion of nitro-glycerine, or by the detonation of any other violently exploding substance. Nitro-glycerine being a liquid, if it cannot escape,

as for instance in a bore, receives and propagates the initial pressure through its whole mass, and is by that pressure instantaneously heated; hence the first impulse of explosion decomposes the rest.

“There are many means of attaining this impulse of explosion, such as—

“1. When nitro-glycerine in tubes is surrounded by gunpowder, or *vice versa*;

“2. By the spark or heat developed by a strong electric current, when the nitro-glycerine is inclosed on all sides, so as not to afford an escape to the gas developed;

“3. By a capsule;

“4. By any chemical agents developing a gradual heat, through which the initial explosion of nitro-glycerine or some other violently exploding substance may take;

“5. Simply by a fuse. This will do in a closed space and under sufficient resistance, but if the gases of decomposed nitro-glycerine are enabled to escape before they accumulate to such a pressure as to effect the requisite impulse of explosion, the nitro-glycerine is slowly decomposed, and the fire generally goes out before the whole is consumed;

“6. By what I call “igniters.” They may be greatly varied, but in their simplest form they consist of a wooden cylinder, hollow inside and filled with gunpowder, being corked at one end and connected with a fuse at the other. When the nitro-glycerine has been poured into the bore this cylinder is let down with its fuse until the former swims in the blasting oil; then the upper part of the bore is filled with loose sand, and nothing remains but to ignite the fuse. The fuse in its turn fires the gunpowder contained in the wooden cylinder, the hot gases of the gunpowder make their escape, and rush in streams into the blasting oil, of which they heat a minute part; a local detonation takes place, which as the oil cannot escape, heats it by pressure to about 360° Fahrenheit, when it explodes through the whole mass. These igniters are the instruments of which I chiefly make use for causing the the nitro-glycerine to explode.”

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[Here was inserted a diagram representing the mode of exploding nitro-glycerine in conjunction with gunpowder, not material to be shown in this case.]

"In consideration, therefore:

"1. That nitro-glycerine and analogous substances, to which fire can be applied without causing their explosion, are known for many years without having been applied to any practical use in consequence of practical difficulties in promoting their explosion;

"2. That they can be fired without exploding, therein differing from all other explosive substances hitherto used;

"3. That even the blow of a hammer causes only a local explosion;

"4. That I have introduced these substances from the domain of science into that of practical life; and,

"5. That explosive substances, liquid at the ordinary temperature have not as yet been applied to any technical use.

"I claim as my invention:

"1. The use of gunpowder or similar substances when mixed with nitro-glycerine or analogous substances;

"2. The reduction of the quickness of explosion of gunpowder by mixing it with oily, explosive or non-explosive substances;

"3. The effecting the detonation of nitro-glycerine or analogous substances (which can be ignited without exploding) by the heat developed by pressure, promoting an impulse of explosion which decomposes the rest;

"4. The exclusive use of nitro-glycerine and the class of substances described above, or mixtures of such as far as their application may be classed under any of the methods indicated in this memorandum."

Afterwards, but on the same day, said Howson filed in the patent office amendments to said specifications and drawings, which amendments were made in part by striking out a portion of the said specifications filed by Nobel. On October 24, 1865, upon said application, Nobel obtained letters-patent for his invention, with the said amended specifications annexed thereto. The original specifications, as set forth in said Exhibit A, were not annexed to the patent. The

amended specifications annexed to, and made a part of the patent so issued, are as follows, to wit:

"The schedule referred to in these letters-patent and making part of the same.

"To all whom it may concern: Be it known that I, Alfred Nobel, of the City of Hamburg, have invented the use of nitro-glycerine, or analogous substances, as a substitute for gunpowder, and I do hereby declare the following to be a full, clear and exact description of the same, reference being had to the accompanying drawing and to the letters of reference marked thereon. My invention consists in the use, as a substitute for gunpowder, of nitro-glycerine, or its equivalent, substantially in the manner described hereafter, so that the said liquid, which, when exposed, cannot be wholly decomposed and exploded, shall, by confinement, be subjected to heat and pressure, by which its total and immediate decomposition and explosion is effected. In order to enable others to make and use my invention, I will now proceed to describe the method of carrying it into effect.

"On reference to the accompanying drawing, which forms a part of this specification, figure 1 is a view, partly in section, of one apparatus by means of which I render nitro-glycerine, or its equivalent, available as a substitute for gunpowder; and figure 2, a plan view. [A cut was given for illustration.]

"There is a class of explosive substances composing nitro-glycerine—the nitrates of ethyl and methyl, and nitro-manite—which have long been known, but have never been practically applied as explosive agents. When a flame is applied to gunpowder or gun-cotton, the whole mass is instantaneously decomposed; this sudden decomposition taking place both when the substance is unconfined and when it is ignited under pressure.

"On the application of heat or flame to nitro-glycerine, or other of the liquids above-mentioned, when the latter is unconfined, only that portion of the liquid is decomposed which is directly acted on by the heat or flame, so that it is practically impossible to instantaneously explode the entire mass; hence, under ordinary circumstances, such substances

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cannot be looked upon as explosive agents. I have found, however, that when glycerine, mannite, or other of the materials mentioned is confined, and a portion of the same is heated to decomposition, the gases evolved are at such an intense heat, and subject the material to such an excessive pressure, that the whole mass is decomposed almost instantaneously. The chief point of my invention consists in overcoming the difficulty of igniting the entire mass of the materials mentioned, so that the same can be practically used as explosive agents. * * *

“If the material (nitro-glycerine properly prepared) is to be used for blasting, it may be poured directly into the opening drilled into the rock, the opening above the liquid being closed in any suitable manner; for other purposes, however, the material can be best used when confined in cases.

“The material when thus confined may be exploded: Firstly. By exploding a quantity of gunpowder, or other substances in contact with the liquid (the powder being confined in a waterproof tube or case), the heated gases evolved from the powder being distributed throughout the mass of the liquid, raise the temperature of the latter sufficiently to decompose the same. When powder is used for this purpose, the case containing it may be immersed in the liquid, the powder being ignited by means of a fuse, or by an electric spark. If desirable, however, the liquid may be placed in a tube and inserted in a mass of powder, which is then ignited in any suitable manner. Secondly. By an electric spark, or by passing a powerful current of electricity through a fine wire immersed in the liquid, an apparatus for thus effecting the explosion of the fluid is shown in the accompanying drawing, A being the case containing the fluid; BB, two wires which pass through glass tubes *aa*, or through other insulating substances into the interior of the case; and *c*, a fine platina wire which connects the ends of the wires BB together within the case. The platina wire is heated by an electric current, the material in contact with the wire being thus decomposed, and the remaining portion subjected to the heat and pressure

necessary to instantaneously decompose the whole mass, as already described. Thirdly. By inserting in the liquid a thin case containing lime and water, or any substances which in combining evolve heat. Fourthly. By a fuse. This will do in a closed space, and under sufficient pressure, but if the gases of the decomposed liquid are enabled to escape before they accumulate to such a pressure as to effect the requisite impulses of explosion, the liquid is decomposed but slowly, and the fire expires before the whole mass is consumed.

"I claim as my invention, and desire to secure by letters-patent the use of nitro-glycerine, or its equivalent, substantially in the manner and for the purpose described."

Nobel having assigned his said patent to the United States Blasting-oil Company, his said assignee in 1869, surrendered the original patent, and procured re-issues in several divisions, one of which is re-issue No. 3380, Division D. The specification annexed to this re-issue, so far as they tend to illustrate the points decided, are as follows, to wit:

"Be it known that Alfred Nobel, of the city of Hamburg, Germany, has discovered, or invented, a new and useful improvement in the sciences and arts pertaining to the use and manufacture of nitro-glycerine. This specification having special references to improvement in the use of nitro-glycerine."

The said Nobel does not claim to have discovered or invented nitro-glycerine, as that was due to Sobrero. After the simple discovery and chemical analysis that glycerine was capable of giving, when mixed with nitric and sulphuric acids, a substance analogous to gun-cotton, Sobrero abandoned further research with the declared opinion that its combustion or explosion could not be managed. In this condition the discovery or invention remained utterly useless to men of science and to artisans, until the discoveries and inventions of Nobel brought it into practical service in the useful arts. He discovered: First. That in order to explode the whole, or even a large proportion of a mass of nitro-glycerine, it was necessary to subject it to confinement or restraint, and that when so confined it could be exploded

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in any desired quantity, by the application of heat and pressure, or of either of those agencies.

Second. That it could be used for practical blasting, and disrupting material substances generally. And the said Nobel invented * * *. Second. The appliances or contrivances necessary to successfully explode nitro-glycerine, in any desired quantity, under the management of miners or men of practical intelligence.

We now proceed to make a clear and concise description of the said discoveries and inventions of the said Nobel, in order to enable others skilled in the sciences and arts to which they belong, to make use of and understand the same.

First. The nitro-glycerine, when under conditions of confinement, can be exploded in any desired quantity. There is a class of explosive substances, comprising nitro-glycerine, the nitrates of ethyl and methyl, and nitro-mannite, which have long been known, but have never been practically applied as explosive agents. When 578° Fahrenheit of heat is applied to granulated gunpowder, the whole mass is exploded. Gun-cotton will explode in proportion to the degree of confinement, igniting at 266° Fahrenheit. Fulminates, ordinarily used in percussion-caps, will explode when subjected to 340° Fahrenheit. Nitro-glycerine will explode at 360° Fahrenheit. The decomposition of the above and other analogous substances, however, take place at a much lower temperature, when subjected to pressure.

Gunpowder will explode to a certain extent, when not confined, but on the application of heat or flame to nitro-glycerine, or other of the liquids above mentioned, when unconfined, only that portion of the liquid is decomposed which is acted on directly by the heat or flame, so that it is practically impossible instantaneously to explode the entire mass. Nobel discovered that when nitro-glycerine, mannite, or other of the materials mentioned, is confined, and a portion of the same is heated to decomposition, the gases evolved are at such an intense heat, and subject the material to such an excessive pressure, that the whole mass is decomposed almost instantaneously. The degree of confinement must be sufficient to allow a pressure upon the

nitro-glycerine to an extent that 360° Fahrenheit will be realized, or to hold it in the presence of a percussion-cap, or other highly explosive agent, so that decomposition will take place before the liquid can escape the force or heat of the evolved gases of the said cap, etc. In this manner and by other methods Nobel discovered or invented that nitro-glycerine could be exploded in any desired quantity.

Second. That nitro-glycerine could be used for practical blasting and disruption of material substances generally.

Having discovered that nitro-glycerine could be exploded in any desired quantity, at the will of the manipulator, Nobel then proceeded to adopt it to the useful arts, such as blasting rock, earth, and material substances generally. To effect this object, he invented the mode or method hereinafter described, in substance as follows: Placing the nitro-glycerine in a drill-hole or canister, and then exploding in the midst of the said nitro-glycerine a charge of gunpowder, gun-cotton, or injecting an electric flame into the mass of nitro-glycerine, or the heating to red heat of a metallic wire placed within the nitro-glycerine; the necessary heat will be effective in the decomposition of an atom or more of the nitro-glycerine, when confined, which will cause the explosion of the whole mass. * * *

Second. The appliances or contrivances necessary to successfully and practically explode or decompose nitro-glycerine in any desired quantity, under the management of miners, or men of practical intelligence. The processes or contrivances invented by Nobel for exploding nitro-glycerine, etc., are of several kinds, all and each calculated to produce the required heat or percussion: First, by an electric spark, or current of electricity, illustrated and explained as follows: * * * [Here follow references to drawings.] Secondly, by exploding a quantity of gunpowder or other substance in contact with the liquid (the powder being confined in a water-proof tube or case), the heated gases evolved from the powder being distributed throughout the mass of the liquid, raise the temperature of the latter sufficiently to decompose the same. When powder is used for this purpose, the case containing it may be im-

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mersed in the liquid, the powder being ignited by means of a fuse, or by an electric spark. If desirable, however, the liquid may be placed in a tube, and inserted in a mass of powder, which is then ignited in any suitable manner.

* * * [Illustrations follow.] Thirdly, the nitro-glycerine placed in a drill-hole or canister * * * may be exploded by a train fuse of fulminate powder, or composition; for example, the ordinary fulminate powder used in percussion-caps may be put in a tube, or casing of fibre, gutta percha, and made to fire, explode, or spit into the nitro-glycerine. This will do in a closed space and under sufficient pressure, but if the gases of the decomposed liquid are enabled to escape before they accumulate to such a pressure as to affect the requisite impulses of explosion, the liquid is decomposed but slowly, and the fire expires before the whole mass is consumed. Fourthly, by inserting in the liquid a thin case containing lime and water, or any substance, which, when combining, evolve heat. Also, by the liberation of substances or matter, either with the nitro-glycerine, in the presence of the nitro-glycerine, or in the midst of nitro-glycerine, by which process or processes, mixing, engaging, or forming gases may be evolved of sufficient heat to produce decomposition, or explosion of the nitro-glycerine.

Having thus fully described the discoveries and inventions of the said Alfred Nobel, with sufficient clearness and distinctness to enable others skilled in the sciences and arts to which they belong, to make and use the same, what we claim as the discoveries or inventions of the said Nobel, and desire to secure by letters-patent, in the name of the United States Blasting Oil Company, aforesaid, as the assignee of the said Nobel, is as follows:

“The application and use of nitro-glycerine, simple or compounded, as an explosive for blasting, or for disrupting purposes, in the manner, and substantially as hereinbefore described.”

In 1872, the company surrendered re-issue No. 3380 Division D, and procured further re-issues on that in two divisions, designated re-issues No. 4818, Division D, and

re-issue No. 4819, Division E. The specifications annexed to said re-issue No. 4818, so far as they are important in this case, are as follows, to wit (after stating the difficulty in exploding a body of nitro-glycerine, he proceeds):

“A principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine and the analogous substances before named as explosives. For this end two different methods have been invented by Nobel for promoting the explosion of nitro-glycerine. One method, which forms the subject of this patent, relates to a compound with nitro-glycerine of other more easily explosive substances; and the other method, which is described in a separate specification, relates to the means of effecting the explosion. Nobel discovered that the difficulty experienced in effecting the explosion of nitro-glycerine, and the analogous substances before mentioned, could be overcome by mixing or combining them with gunpowder, gun-cotton, or other similar substances. This mixing may be effected in any convenient manner, and the proportions in which they are to be combined may be varied to suit the pleasure or convenience of the user or manufacturer. The nitro-glycerine may be mixed with gunpowder or gun-cotton, either of which will absorb a considerable quantity of nitro-glycerine—say thirty-per cent., more or less—in such proportions as to make the compound either wet or comparatively dry. If mixed with gunpowder, it may be either absorbed with it, by pouring the nitro-glycerine on the mass of gunpowder, or the two may be mingled together by trituration, the powder in the nitro-glycerine.

“The effect of these combinations will produce an explosive especially suitable for certain blasting purposes—for example, in crevice-rock—and greatly superior either to gunpowder or gun-cotton in explosive force, and quite readily exploded, so that it may be fired and exploded by means of a match or electric spark, in like manner as gunpowder or gun-cotton alone. By means of this combination with gunpowder, gun-cotton, or other similar readily explosive substances, of nitro-glycerine, and the analogous substances before named, which are liquid at the ordinary

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temperature, these substances which had not at the date of Nobel's invention been applied to any technical use as explosives, owing to their difficulty of explosion, have been introduced from the domain of science into that of practical use in the arts, and have rendered of commercial value what was previously known as a mere chemical curiosity.

"We therefore claim as the invention of said Alfred Nobel, and desire to secure by letters-patent, in the name of the United States Blasting-oil Company, as assignees of said Nobel:

"1. The utilization, as explosives, of nitro-glycerine, and the analogous substances hereinbefore mentioned, by combining therewith gunpowder, gun-cotton, or other similar substances developing a rapid heat on combustion, substantially as hereinbefore described;

"2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes hereinbefore described;

"3. The combination of gun-cotton with nitro-glycerine, substantially as and for the purposes hereinbefore described."

The important parts of the specifications of No. 4819 are as follows:

"The principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine as an explosive. For this end two different methods have been invented by Nobel for promoting the explosion of nitro-glycerine. One method, which forms the subject of this patent, consists in a compound with nitro-glycerine of a readily-ignitable substance; and the other method, which is described in a separate specification, relates to the means of effecting the explosion.

"Nobel discovered that by mixing nitro-glycerine with rocket powder, which is a mere loose, mechanical mixture of nitre, charcoal and sulphur, the difficulty in effecting the explosion of nitro-glycerine was effectually overcome. Rocket powder is almost non-explosive, but readily burns and deflagrates on contact with a spark of fire, while nitro-glycerine, on the other hand, as before stated, is hard to

explode, but when the explosion is obtained is extremely violent in its effects. By the mixing of these substances a compound is produced which is a very powerful explosive, and is easily exploded by means of the simple contact with fire. The mixing may be effected in any convenient manner, and the proportions in which they are combined may be varied to suit the pleasure or convenience of the user or manufacturer. What, therefore, we claim as the invention of Alfred Nobel and desire to secure by letters-patent is: The mixture of nitro-glycerine and rocket powder, substantially as and for the purpose herein before described."

"The complainant in the bill insisted that under section 53 of the act of 1870, cited in the opinion, the commissioner of patents in granting re-issues was entitled to look at the original specifications filed by Nobel, set out in Exhibit A, for which the annexed specifications filed by Howson were substituted in the original patent, for the purpose of ascertaining what the entire invention was, for which Nobel himself desired a patent; and that these specifications embraced the matter covered by the several divisional re-issues. It was also claimed on behalf of complainant that these specifications having been filed in the patent office with the application of Nobel, although not annexed to the patent, are still a part of the record of the patent in the patent office, and as such part of the record the commissioner was entitled to consider them for the purpose of ascertaining what the entire invention was, for the purposes of the re-issues, independent of the provision of the statute authorizing him to receive extraneous proofs in cases where there is no model or drawing. These propositions were denied on the part of the defendant.

Hall McAllister, M. A. Wheaton and Jno. B. Felton, for complainant.

C. R. Greathouse and W. W. Cope, for defendants.

Mr. Justice FIELD. This is a suit for an alleged infringement of three letters-patent, with a prayer that the defendants be decreed to account for and pay to the complainant

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the gains and profits derived by them from the manufacture, use or sale of the invention patented, and be restrained from further infringement. All of these patents are re-issued letters. They purport to be founded, two of them upon an original patent issued to Alfred Nobel, in October, 1865, and the other one upon an original patent issued to an assignee of Nobel in April, 1868. Upon the validity of the latter re-issue no question is made. The validity of the other re-issues is assailed upon the alleged ground that they describe and claim a different invention from that described and claimed in the original patent, and their validity is the question presented by the demurrer.

The several patents, original and re-issued, are referred to in the bill and made part of it, so that the question raised as to the validity of the re-issues is distinctly presented. It appears from inspection of the schedule annexed to the original patent to Nobel of October, 1865, giving a description of his alleged invention, and which constitutes a part of the patent, that he declares that he has "invented the use of nitro-glycerine or analogous substances as a substitute for gunpowder," and then proceeds to indicate the manner in which the nitro-glycerine can be used so that the "liquid, which when exposed cannot be wholly decomposed and exploded, shall by confinement be subjected to heat and pressure by which its total and immediate decomposition and explosion" may be effected. There is no mention in the schedule of any mixture of the nitro-glycerine with other substances so as to form a new compound. The only reference to any mixture is in a paragraph which, in describing the manner of using the nitro-glycerine, states that it should be first prepared by adding a mixture of sulphuric and nitric acids. The schedule then gives in detail four modes in which the explosion of the nitro-glycerine can be effected. The first is by exploding in contact with it a quantity of gunpowder confined in a waterproof tube or case; the second is by an electric spark, or by passing a powerful current of electricity through a fine wire immersed in the liquid; the third is by inserting in the liquid a thin case containing lime and water, or any substances which

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in combining evolve heat; and the fourth is by a fuse. The schedule closes by a declaration that what the patentee claimed as his invention and desired to secure by letters-patent was "the use of nitro-glycerine or its equivalent substantially in the manner and for the purpose described."

It is plain from this statement that the patent was for a process and not for a compound. It was for modes of using the liquid and not for any new compound of known or unknown ingredients.

In the following year, in June, 1866, Nobel, whose letters-patent extended for seventeen years, assigned his interest in them, and the invention secured, for the residue of that period, to the United States Blasting-oil Company, a corporation created under the laws of New York. In April, 1869, this company surrendered the original letters, and obtained in their place four new divisional letters-patent for the residue of the period then unexpired, designated respectively as re-issue No. 3,377, Division A; re-issue No. 3,378, Division B; re-issue No. 3,379, Division C; re-issue No. 3,380, Division D.

In March, 1872, the company surrendered this last divisional re-issue, designated No. 3,380, Division D, and obtained for it two new divisional letters-patent, numbered and designated as re-issue No. 4,818, Division D, and re-issue 4,819, Division E. It is with reference to the validity of these two last re-issues that the contention in this case arises. No. 4,818 is for two compounds, one consisting of nitro-glycerine and gunpowder, and the other of nitro-glycerine and gun-cotton. No. 4,819 is for a compound consisting of nitro-glycerine and rocket powder. Neither of these re-issued patents is for any process, or mode of exploding nitro-glycerine, or for any particular use of the liquid. Both of them are for new compounds, made by uniting old and well-known substances. There is no connection or relation between the inventions or discoveries covered by them and the invention or discovery described and claimed in the original patent. If, therefore, we are restricted in our examination to the original patent and the schedule annexed, the re-issues cannot be sustained. Can we look

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beyond that patent and schedule, which is a part of the patent, to ascertain what the original patentee had, in fact, at the time invented or discovered, though not described in his specifications or covered by his claim?

The statute of 1870, under which these re-issues were granted, provides that "whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specifications to be issued to the patentee;" and the commissioner is authorized in his discretion to cause several patents to be issued for distinct and separate parts of the thing patented upon demand of the applicant. But the act declares that "no new matter shall be introduced into the specifications, nor in case of a machine patent shall the model or drawing be amended, except each by the other, but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

It is by this law that the last re-issues must be determined. As here provided, no re-issue is permitted, unless the original patent is inoperative or invalid from a defective or insufficient specification, or the claim of the patentee exceeds his right; and then only in case the error committed has arisen in the manner indicated. In determining the propriety of the re-issue no new matter can be introduced into the specification, except in case of a machine patent, to which class the one under consideration does not belong. It is only with respect to patents of that character where no model or drawing exists, that, in our judgment, any notice can be taken, by the commissioner, of matter outside of the original specification and claim. (*Turr v. Webb*, 5 Fish,

596.) In machine patents, models and drawings can be examined in connection with the specification, and the latter changed, restricted, or enlarged so as fully to describe the actual invention made. If the patent do not relate to a machine, the specification, if defective, may be made more definite and certain so as to embrace the claim made, or the claim may be so modified as to correspond with the specification. But this is the extent, in our judgment, to which modifications can be made in such cases.

Judged by the law, there can be, in our opinion, no reasonable doubt as to the invalidity of the re-issues. The original patent to Nobel was neither inoperative nor invalid by reason of any defective or insufficient specification. That specification was unambiguous, and covered all that was claimed. And if this were otherwise, no new matter not relating to the process claimed, but relating to a compound made by uniting glycerine with other substances could be added to the specification. This is the explicit provision of the statute.

If Nobel had made other inventions or discoveries—compounds of nitro-glycerine with other substances or different modes of using the liquid (as it would seem, from the memorandum annexed to the bill that he had), he might have applied for and obtained separate patents for them. (*Larver v. Hall*, 9 Blatchford, 526.) But such compounds or different modes of use cannot be included in a re-issued patent when the original never embraced them, without sanctioning a doctrine which would open the door to all sorts of extortion and fraud, and impose an oppressive burden upon the industries of the country.

By the terms of the statute, a re-issue must be for the same invention which is embraced by the original patent, or if the re-issue be in divisional parts, each division must be for some distinct and separate part of that invention. The two letters-patent under consideration in the present case are not only for inventions not embraced by the original patent, but are not embraced by the first re-issue, upon the surrender of which they were re-issued, designated as re-issue No. 3,380, Division D. That re-issue was only for

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a process, a mode of applying and using nitro-glycerine, simple or compounded, and not for any new explosive compounds, as inaccurately stated in the bill. This will be seen by examination of the letters referred to and made part of the bill. The two letters issued upon the surrender of that re-issue are, therefore, invalid within the ruling of Chief Justice Taney, in *Knight v. The Baltimore and Ohio Railroad Company*, 3 Fisher, 1, and might have been disposed of without showing, as we have done, that they were invalid because they were for inventions not covered by the original patent.

We do not question the doctrine so earnestly pressed by counsel upon the argument that all presumptions in support of the action of the commissioner in granting the re-issues must be indulged, and that his ruling upon all matters not apparent upon the face of the patents themselves cannot be collaterally assailed. We rest our judgment upon a comparison of the original and the re-issued patents, and hold as a matter of construction that the latter are not on their face issued for the same invention, or any distinct and separate part thereof; and that for this reason the commissioner exceeded his authority in issuing them. (*Seymour v. Osborn*, 11 Wall. 544.)

The defendants must have judgment on the demurrer, with leave to the complainant to amend the bill by striking out all such parts as relate to the re-issued patents No. 4,818 and No. 4,819.

SAWYER, Circuit Judge, concurring specially. Upon a careful consideration of the case of *Seymour v. Osborn*, I am satisfied that the Supreme Court intended to lay down the rule broadly, that on an application for the re-issue of a patent the commissioner, in ascertaining the invention intended to be patented, and for which a re-issue may be granted, has no authority to look beyond the patent as originally granted with the specifications and drawings thereto annexed, and the models deposited in the patent office, "except in certain special cases as provided in a recent enactment," referred to and cited by the court, viz:

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16 Statutes at Large, 206 (11 Wal. 544-5). The enactment referred to is found in the last clause of section 53 of the act of 1870, and is in the following words: "But when there is neither model nor drawings, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident or mistake as aforesaid." This is the only exception the court recognizes to the rule as broadly and specifically stated, and repeated in different forms in the course of the opinion; and the exception is referred to "as provided by a recent enactment"—that is to say, the exception depends upon that provision of the statute. The provision was not in the act of 1836. As the exception is held to depend upon this enactment, it, of course, did not exist under the act of 1836; and under that act there was, in the opinion of the Supreme Court, no exception to the rule as laid down by that tribunal. The original patent to Nobel was issued in 1865, under the provisions of the act of 1836; and he could only obtain such rights as were secured to him by that act. On an application for a re-issue at any time during the five years intervening between the issue of the original patent and the passage of the act of 1870, under the rule established by the Supreme Court, there being no model, he would have been limited in the re-issue to the invention as described, suggested, or substantially indicated, or shown in the original patent and the specifications and drawings appended thereto. Beyond this he could not go, and nowhere in the original patent and the specifications and drawings annexed to it is the subject matter of the re-issued patents numbers 4,818 and 4,819 in anyway suggested. These re-issues, therefore, could not have legally been made under the act of 1836. The rights of the parties must be determined under the provisions of that act, and the right to patents for these inventions, if it ever existed, lapsed by a failure to perfect it while that act was still in force. The proceeding for obtaining a re-issue since the passage of the act of 1870, so far as form is concerned, must be in accordance with the

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latter act. But to allow a party under the provision cited to go outside of the evidence recognized under the act of 1836 to establish a right to a re-issue of a patent for an invention made and patented under that act, would be going beyond the mere forms and modes of proceedings, and would be to grant him a new right by restoring a right to a patent, if one ever existed, which had once been lost either by carelessness or design under the laws then in force, and after the public had acquired a right in the subject-matter by several years unobstructed legal use—the right to an original patent having been lost by lapse of time, and to a re-issue by failure to indicate the whole invention in the specifications finally adopted and annexed to the patent first issued. The last clause of section 53 of the act of 1870, so far as granting a new right is concerned, in my judgment has no retroactive operation; and it can only apply to re-issues of patents originally issued since the passage of the act.

This is as far as it is necessary to go in this case, and I prefer not to consider or determine the extent of the exceptions made by that provision until a case arises under a patent originally issued under the act of 1870. On these grounds I concur in the judgment ordered.

F. MORA v. JOHN FOSTER ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 22, 1875.

1. MEXICAN GRANT TO CHURCH.—A claim to land made by the Catholic bishop, of Monterey, by virtue of a Mexican grant to the church for religious purposes, is “of a right or title derived from the Spanish or Mexican governments,” and is, by the terms of the act of Congress one, the validity of which, the board of land commissioners was authorized to consider and determine.
2. SAME.—The board of land commissioners having adjudged the claim to be valid, and its decree not having been subsequently set aside or impeached by any direct proceeding for the purpose, it cannot be collaterally questioned in an action to recover the land based upon such confirmed title.

3. **POWERS OF DEPARTMENTAL ASSEMBLY.**—The Departmental Assembly of California under the Mexican government, had no power to authorize the sale of any lands other than those of the department. It could not confer upon the government any power over the domain of the nation, its authority upon that subject being limited by the colonization laws to the approval or disapproval of grants made by the governor under those laws.
4. **TWO CONFIRMED GRANTS.**—Where a grant made to the church for religious purposes in 1796, was finally confirmed by the board of land commissioners to the Roman Catholic bishop of Monterey, and another grant to another party embracing the same land by governor Pio Pico, in 1845, upon a sale made by direction of the Departmental Assembly, was also finally confirmed: *Held*, That the latter grant affords no defense to an action to recover possession of the land founded upon the former.
5. **DAMAGES.**—Where there is no evidence of the possession of the defendants at any time anterior to the date of the commencement of the suit to recover possession of land, only nominal damages can be allowed.

Before Mr. Justice FIELD, and SAWYER, Circuit Judge.

The facts are sufficiently stated in the opinion of the Court.

Doyle & Barber, for plaintiff.

John B. Felton and E. L. Gould, for defendants.

By the Court, Mr. Justice FIELD. The questions involved in this case have been substantially determined by the Supreme Court in the cases of the *United States v. Workman*, and *Beard v. Federy*, reported in the first and third of Wallace, respectively, as will be seen by their examination. The present action is ejectment for the possession of certain church lands of the Mission of San Juan Capistrano in the county of Los Angeles, consisting of the church, churchyard, cemetery, garden, orchard and vineyard with the necessary buildings and appurtenances, the whole comprised within an area of forty-four acres and four-tenths of an acre. The plaintiff traces his title through Joseph S. Alemany, formerly Catholic bishop of Monterey, to whom a patent of the premises was issued by the United States on the eighteenth of March, 1865. The record of the proceedings before the board of land commissioners, which resulted in a

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decree confirming the claim, upon which the patent was issued, was introduced in evidence; and in the petition of the bishop it was averred, in substance, that at the time of the conquest and cession of California to the United States, the canon law of the Roman Catholic church was recognized, and in force, as the law of Mexico, as it had been in Spain, when Mexico was a dependency thereof, in all things relating to the acquisition, transmission and disposal of property real or personal belonging to the church, or devoted to religious uses; that by the laws of Spain and Mexico thus in force in California, the title, control and administration of all ecclesiastical or church property were vested in the hands of the bishop and clergy of the diocese, who for such purposes were regarded as a body corporate; that at the date of the conquest and cession of California the Catholic church had been in the actual and undisturbed possession of the premises in controversy since the year 1796; and that for the purpose of enabling the petitioner to hold the church property and administer the temporalities of the church and manage its estate and property, he had been incorporated as a sole corporation by legislation of the State of California, under the name and title of Bishop of Monterey. The claim thus asserted by the Catholic church, through its bishop, to the lands in controversy, is "of a right or title derived from the Spanish or Mexican governments," and is thus by the very terms of the act of Congress, one the validity of which the board of land commissioners was authorized to consider and determine. Having considered it and having adjudged it to be valid, its validity not having been in any direct proceeding subsequently impeached, cannot now be questioned in the present action.

The defendants assert title under a grant of land made by Governor Pio Pico in 1845, upon a sale directed by order of the departmental assembly, which grant was confirmed under the act of Congress of March 3, 1851. It is admitted for the purposes of this action that the confirmation has been followed by a survey approved by the surveyor-general of the United States. But this grant and confirmation cannot aid the possession of the defendants as against the patent

under which the plaintiff claims. The departmental assembly possessed no power to authorize a sale of any lands other than those of the department. Its powers were very carefully considered by the Supreme Court in the case of the *United States v. Workman*, and it was there held that that body could not confer upon the governor any power over the domain of the nation, and that its own power in the alienation of public property of that character was limited, by the colonization laws of Mexico, to the approval or disapproval of grants made by the governor under those laws.

The counsel of the defendants feeling the force of the adjudication in that case, contends that the title to the church lands was never vested in the bishop, or in the Catholic Church, but remained in the Mexican nation at the time of the conquest and cession of the country; and that the patent to the bishop is not therefore evidence of any title anterior to its date, and can only be treated as a conveyance of the interest which the United States then possessed; and that the defendants' confirmation and approved survey, taking effect by relation as of the date of their petition to the land commission, carries an earlier title.

The obvious answer to this position is, that the adjudication of the Supreme Court that the departmental assembly had no authority to authorize the governor to sell any portion of the public domain, nullifies the effect of the confirmation. That confirmation does not of itself translate the title of the United States. As declaring the validity of an existing title it might operate to protect the estate of the confirmee. But the validity of that title having been assailed by the Supreme Court and overthrown, the confirmation can afford no aid to the defendants in their contest with the title of the plaintiff.

The patent is also something more than a mere conveyance of the government; it is evidence having the force and operation of a record that the title claimed was valid, or at least entitled to recognition and confirmation, at the time the sovereignty of Mexico over the country was superseded by the sovereign authority of the United States. It is evidence to that extent which is not open to dispute in an ac-

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tion of ejectment, except where the assailant comes into court possessed of a similar record or one of equal dignity. The defendants stand in no such position; they have no such record; their confirmation and survey being of a claim, belonging to a class adjudged invalid by the highest tribunal of the nation, furnishes no vantage ground to them in an attack upon an established and patented title, beyond that held by mere trespassers.

The plaintiff is therefore entitled to the premises. It is admitted that the defendants were in the possession at the commencement of the action, but there is no evidence of their possession at any previous period. There is therefore no foundation laid for the recovery of any other than nominal damages, and none will therefore be awarded.

The plaintiff must have judgment for the possession of the premises with one dollar damages, and it is so ordered.

UNITED STATES v. ADOLPHUS WAITZ.

DISTRICT COURT, DISTRICT OF NEVADA.

JUNE 20, 1876.

1. EXTORTION DEFINED.—Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due.
2. IDEM—REGISTER OF LAND OFFICE.—The register of a land office cannot lawfully act as attorney for any applicant for a patent for mineral land, whose application is filed, and the proceedings on which are to be conducted before him, and in his office.
3. IDEM.—If a register undertakes to act as attorney for an applicant in procuring a patent, and receive from him a gross sum, and this sum is taken as well for the execution of his official duties as doing some other things relating to procuring the patent, and no specified portion of it is taken as compensation for the one or the other, and the sum so taken is in excess of the fees allowed him by law, such taking of the money is extortion.

Before HILLYER, District Judge.

The defendant, Waitz, was indicted for extortion while register of the land office. On the trial, the evidence tended to prove that Waitz had taken from one Ellen

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Grandona, an applicant for a mineral patent, the sum of \$200, as a fee for obtaining a patent for her; that Waitz had at one time been admitted to the bar as an attorney at law; that he took this money from Mrs. Grandona partly as an attorney fee for conducting the proceedings to obtain the patent before himself, and partly for fees as register; that no particular portion of the money was taken either as register or attorney fee, but the work which he claimed to do as attorney and his official duties as register were all mixed and indiscriminately joined together, and a gross sum of money taken for the whole.

C. S. Varian, United States Attorney.

C. E. De Long, for defendant.

HILLYER, J., charged the jury upon the main proposition in the case as follows:

Section 5481 of the revised statutes provides that "every officer of the United States who is guilty of extortion, under color of his office, shall be punished by fine," etc.

Extortion is thus defined: It is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of any money or thing of value, by color of his office, in excess of what is due him, or before it is due to him.

The fees of the register of the land office are prescribed by law, and it is a general rule that no public officer may lawfully take any other fees or rewards for doing anything relating to his office than such fees as some statute in force gives him.

The statute law of the United States allows the following compensation to registers: First, a salary of \$500 a year; second, a commission of one per centum on all moneys received at the receiver's office of his land district; third, a fee of five dollars for filing and acting upon each application for mineral lands; fourth, a fee of twenty-two and a half cents per hundred words for writing done in the land office in establishing claims for mineral land. Their com-

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pensation for one year, including salary, commissions and fees shall not exceed \$3000.

It is further enacted that upon satisfactory proof that a register has charged or received fees or other rewards not authorized by law he shall forthwith be removed from office. He is also required to administer all oaths required by law or the instructions of his department, connected with the entry and sale of public lands without charging, or receiving directly or indirectly any fee therefor.

From all these provisions of the law it is plain that the compensation of a register of the land office is definitely fixed by the statutes of the United States, and that it is not lawful for him to charge or receive any other fees or rewards, directly or indirectly, for doing anything relating to his office of register. It is the aim of the law-maker in fixing the fees of a public officer to give him what will be sufficient pay for doing the duties required of him. It will rarely or never happen that everything which it is the duty of the officer to do is set down in the fee bill. But a salary, or commission, or fee is given him which will make the office sufficiently remunerative, in the judgment of the legislators. For those items for which a fee is fixed, the officer must take the sum given and the applicant must pay it and be content. Those duties for which no fee is set down in the law must still be performed by the officer without charge, or rather are regarded as covered by the salary, the commissions or fees given for other matters. (*Irwin v. Com.*, 1 Ser. & R., 504.)

In the next place it will be advisable to ascertain as clearly as may be what the duties of a register are in reference to these applications for mineral lands, and then having a knowledge of his duties and his lawful fees, you will be able, I trust, without difficulty, to come to a right decision upon the main question in this case, viz., whether money was taken by the defendant from the prosecutrix for the execution of his official duty, when either no fee was due for the service, or when a less one was due than he took.

By section 2478 of the U. S. Revised Statutes, the com-

missioner of the general land office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulation, this statute in relation to mineral lands. He has made these regulations and I will now call your attention to some of them.

[The judge here read from the instructions of the commissioner of the general land office in relation to the survey and entry of lode and placer claims.]

From these instructions you will see that the duties of register extend over and have relation to everything that is done from filing the application until the papers are sent to Washington with his and the receiver's opinion on them. It is true he is not bound to draw up the paper called an application, but if he does he can lawfully charge but fifteen cents a folio of one hundred words for writing it. So as to other affidavits in land cases.

It is not denied that the defendant took a larger sum of money from Mrs. Grandona than he was entitled to as register, but his plea is that the money was taken as an attorney's fee, not as a register's fee. This plea of the defendant has received much consideration on my part, and the result is, that I consider it perfectly clear, and so charge you, that the defendant, while register, could not lawfully act as attorney for any applicant for a patent whose application was filed, and the proceedings on which were to be conducted before him and in his office.

Many of the duties of the register are of a judicial character, and require the exercise of his impartial judgment. He should see that no fraudulent claim is enforced against the government. He has to pass upon the regularity of all the proceedings, and how can he do this impartially if he is the paid attorney of either party before him? But if this thing might lawfully be done, a more serious evil would result from the power it would give the officer to obtain money from those who were compelled to come to him as register. The compensation of the register is fixed by law, as well as his duties; citizens are compelled to go to him to make an application for a patent, and hence it is of great importance that his fees should be fixed with precision, so that he may

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have no excuse for taking excessive fees or imposing upon the ignorant. For this reason the legislature have fixed the fees of the register, so that each citizen may know what he has to pay. But the register cannot lawfully engage himself to an applicant to do all that may be necessary to get a patent, and charge a gross sum for his services, covering his legal fees and those he is not entitled to as register. And the reason is, that in so doing he puts himself on unfair ground toward the applicant. Some of the services he is bound to apply to the register for, because no one else can do them, hence to allow him to take a sum in excess of his legal fees under the name of attorney's fee would be in effect the placing of every applicant for a patent in the power of the register.

Upon this branch of the case, I give you the following instruction: If you believe from the evidence that Mrs. Grandona paid the defendant two hundred dollars, or other sum, for getting her patent, and that this sum was paid defendant as well for the execution of his official duties as doing some other things relating to the getting of the patent, and that there was no specified portion of it taken as compensation or fee for the one or the other, and that the sum taken was in excess of his legal fees, then the taking of the money was extortion.

UNITED STATES v. JESSE D. CARR ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 27, 1875.

1. THE TITLE OF THE CITY OF SAN FRANCISCO, under the Mexican law, was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties.
2. LANDS OCCUPIED FOR PUBLIC USES WITHIN EXCEPTIONS OF ACT OF CONGRESS.—As against parties having no title in themselves, holding by intrusion, mere trespassers, the possession of the government for a hospital for infirm and disabled seamen, of a part of the four lots in

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the city of San Francisco, upon which the hospital is situated, under a deed from the city authorities, with claim to the remainder of the lots for the same purposes, and the assertion of that claim by the removal of the intruders, is an occupation for public uses of the whole premises, within the meaning of the act of Congress of 1864, which excepts from the grant to the city "all sites or other parcels of land" which had been or were then occupied for such uses by the United States.

3. DEDICATION TO PUBLIC USES.—The setting apart of the premises for a hospital by direction of the government, with the appropriation by Congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act of March 8, 1866, both of which excepted from confirmation to the city parcels of land which had been previously reserved or dedicated to public uses.

Before Mr. Justice FIELD.

This suit was brought to quiet the title to four fifty-vara lots, situated within the city of San Francisco, upon two of which stands the United States Marine Hospital.

In June, 1851, commissioners for the construction of public buildings in San Francisco, appointed by the Secretary of the Treasury, selected a place on what is known as Rincon Point in the city, as a suitable site for a marine hospital. Previous to the selection, and on the thirtieth of September, 1850, Congress had appropriated the sum of fifty thousand dollars for the construction of a marine hospital, to be located by the Secretary of the Treasury at or near San Francisco. In August, 1852, and in August, 1854, further appropriations were made for the completion of the building, and the arrangement and inclosure of the grounds upon which it is situated. But previous to the commencement of the building the commissioners applied to the city authorities of San Francisco for a conveyance of the city's interest in the land which had been selected. In accordance with this application an ordinance was passed by the common council of the city, directing the mayor to execute a conveyance of the right, title and interest of the city to a block of land consisting of six fifty-vara lots, four of which constitute the premises in controversy. Subsequently the hospital was erected on two of the lots, num-

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bered one and two of the blocks; and outstanding buildings connected with the hospital were constructed on two others of the lots, numbered three and four of the block; and these two were inclosed by a high fence connecting with the building. It is upon this deed and the subsequent use of the lots for a marine hospital that the United States rely.

At the time the United States took possession of lots three and four there were several persons upon them, some of whom voluntarily left, and others were removed by the marshal of the United States. The defendants claim under parties thus dispossessed, and assert title to the premises under an ordinance of the city of San Francisco, known as the Van Ness ordinance, from its author, passed on the twentieth of June, 1855. By that ordinance the city relinquished and granted all her right and claim to the lauds within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, *or if interrupted by an intruder or trespasser, had been or might be recovered by legal process.* This ordinance was ratified and confirmed by the legislature of California on the eleventh of March, 1858.

On the first of July, 1864, Congress passed an act entitled "An Act to expedite the settlement of titles to land in the State of California," by the fifth section of which, all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined by her charter of April 15, 1851, were relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinance of said city, there being excepted from this relinquishment and grant "all sites or other parcels of land" which had been or then were "occupied by the United States for military, naval, or other public uses." (13 Stats. at Large, 333.)

At the time the Van Ness ordinance was passed, the city of San Francisco asserted title, as successors of a Mexican

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pueblo, to four square leagues of land covering the site of the present city, and had exhibited her claim to the board of land commissioners created under the act of March 3, 1851; and the board had confirmed the claim to a portion of the land, and rejected it for the residue. The city not being satisfied with the portion adjudged to her, prosecuted an appeal from the decision of the board to the United States District Court, from which court the case was transferred to the Circuit Court of the United States for the District of California. That court adjudged the claim of the city to be valid to four square leagues of land subject to certain exceptions and reservations; and on the eighteenth of May, 1865, its final decree in the case was entered, which is as follows:

"Final Decree confirming the Claim of the city of San Francisco to its Pueblo Lands, 1865.

"The city of San Francisco }
v.
"The United States. }

"The appeal in this case taken by the petitioner, the city of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the northern district of California pending said appeal—the said case having been transferred to this court by order of the said District Court, under the provisions of section four of the act entitled 'An Act to expedite the settlement of titles to lands in the State of California,' approved July 1, 1864—and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed, that the claim of the petitioner, the city of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

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"The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A.D. 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: *such parcels of land as have been heretofore reserved or dedicated to public uses by the United States*; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust, for the benefit of the lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

"FIELD, Circuit Judge.

"San Francisco, May 18, 1865."

From this decree the United States and the city of San Francisco appealed—the United States from the whole decree, and the city from so much thereof as included certain lands reserved for public purposes in the estimate of the quantity confirmed. Whilst the appeal was pending in the Supreme Court of the United States, Congress passed the following act:

"An act to quiet the title to certain lands within the corporate limits of the city of San Francisco:

"Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are, hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the *reservations and exceptions designated in said decree*, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: *Provided*, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof. Approved March 8, 1866."

At the December term of the Supreme Court of the United States for 1866—the term following the passage of the above act—the appeal of the United States and the appeal of the city of San Francisco, in the pueblo case, were both dismissed, by stipulation of counsel of the respective parties. (See *Townsend v. Greely*, 5 Wall. 337; and *Grisar v. McDowell*, 6 Wall. 379.)

Walter Van Dyke, United States Attorney.

William Matthews and J. E. McElraith, for the defendants.

MR. JUSTICE FIELD. This is a suit on the equity side of the court to quiet the title of the United States to four fifty-

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vara lots constituting the southeasterly half of the block bounded by Harrison, Spear, Folsom and Main streets, in the city of San Francisco. And the principal question for determination is, whether these lots were excepted from the confirmation to the city by the decree of the Circuit Court of the United States in the Pueblo case, and the legislation of Congress. It is unnecessary to go into any examination of the character of the city's title under the Mexican law; that subject has been elaborately considered in several adjudications of this court. It is sufficient for the purposes of this case to state that the title was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties. It was, therefore, competent for the United States to set apart the premises in question, if not thus vested in private parties, for the erection of a hospital for disabled and infirm seamen, or for any other public purpose, at any time previous to the decree of the Circuit Court in the pueblo case, and the confirmatory act of Congress of March 8, 1866, unless their right was relinquished by the fifth section of the act of July 1, 1864. That act relinquished and granted to the city the interest and right of the United States to lands within the charter limits of 1851, for the uses and purposes of the Van Ness ordinance; but it expressly excepted from its operation "all sites or other parcels of land" which had been or were then occupied by the United States for public uses.

The decree of the Circuit Court in the pueblo case also excepted from confirmation to the city, parcels of land which had been previously reserved or dedicated to public uses; and the confirmatory act of Congress of 1866 provided for the same reservations.

It is clear from the evidence presented in the case, and from the whole history of the action of the government with respect to the Marine Hospital, that the United States have

claimed the right to the four lots in controversy since the deed of the city, executed in December, 1862; and that at the date of the decree in the pueblo case, and the confirmatory act of Congress, they were in possession of the premises under their deed, or at least of a part of them, using such part for the hospital, with claim to the balance for the same purpose. As against parties having no title in themselves, holding by intrusion, mere trespassers, this possession of the government of a part of the lots with claim to the balance under the deed, and the assertion of that claim by the removal of the intruders, is an occupation of the whole premises for a public use, within the meaning of the act of Congress of 1864. And the setting apart of the premises for a hospital by direction of the government, with the appropriation by Congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act.

The defendants rest all their claim upon rights acquired by possession under the Van Ness ordinance. But that ordinance could not apply to lots covered by the previous deed of the city, executed in December, 1862. That deed, it is true, was inoperative against a previous conveyance of the city to the commissioners of the funded debt, or grantees from them, but it was operative against any further disposition of the premises by the city, if any interest remained in the corporation. The Van Ness ordinance could not embrace lands in which the city's interest had been thus disposed of, for that ordinance only purported to give such interest as the city held. Of necessity, it could give no more. (*Hubbard v. Sullivan*, 18 Cal. 508.) The defendants had, therefore, no standing even under the Van Ness ordinance, but were simple intruders whose possession, if it existed as claimed, was, whilst it lasted, illegal and tortious.

The United States must have a decree to quiet the title, and declaring that the claim and assertion of an adverse

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interest by the defendants in the premises in controversy is without any just right and wholly invalid.

And it is so ordered.

THE MARY BELLE ROBERTS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 30, 1875.

1. ABANDONMENT OF A SEAMAN IN A FOREIGN PORT.—Defense by master that the seaman was detained on shore by the municipal authorities of the port: *Held*, unsupported by the proofs.

Before HOFFMAN, District Judge.

D. T. Sullivan, proctor for libellant.

Millon Andros, proctor for claimant.

HOFFMAN, J. The libel, in substance, alleges that the libellant, who was a seaman on board the above vessel, was abandoned and left behind by the master thereof at Iquiqui, in the Republic of Peru, the libellant being then on shore on liberty, and willing and anxious to return on board. The answer was, that the libellant was taken out of the vessel by order of the captain of the port of Iquiqui without the consent and against the wishes of her master; that the master requested the captain of the port to allow the libellant to rejoin the barque, but the captain of the port refused so to do, and the vessel thereupon sailed away without the libellant. The answer further alleges, that libellant was not prevented from rejoining the ship by any act of the master, but by the act of the harbor authorities of said port, and not otherwise.

The evidence shows, that on the day previous to the sailing of the vessel, a dispute occurred between the libellant and the master, in consequence of which the former was, by the master's order, put in irons, and, as he alleges, "triced up." The next morning he requested leave to go ashore to see the captain of the port. This the master refused, until

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he should first have seen the captain. The master accordingly went ashore about nine o'clock in the morning, saw the captain of the port, and, as he says, "told him just how the thing was."

The captain of the port had, it would seem, already heard of the affair through some workmen and the master insists that he made no complaint against the seaman. By his own admission, however, he voluntarily sought the captain and related the whole occurrence. The result was that a boat with a policeman on board was dispatched to the vessel and the libellant brought ashore. The master testifies that this occurred about nine o'clock A. M., and in this he is corroborated by the mate. The libellant states very positively that he was taken ashore after dinner and between two and three o'clock, and David Oakshott, a seaman, testifies to the same effect. The point is not very material except as showing that the man was taken ashore not more than an hour and a half before the vessel sailed, and as tending to show that little opportunity was afforded him to rejoin the ship, and no very strenuous effort was made to recover him.

The libellant states that on landing he saw the master on the mole, and said to him that he desired to see the captain of the port. The master showed him his office, and not finding him in, said he would go up town and see where he was. He did so, and on his return informed the libellant that the captain would be down within half an hour. The master then returned to his vessel and the libellant waited for the return of the captain of the port. On his arrival the libellant informed him that he belonged to the vessel which he saw was beginning to make sail. The captain told him he must wait until the master came ashore again. The libellant then offered a boatman one dollar to put him on board. The captain of the port said something to the boatman, or to a policeman that was near, which the libellant did not understand. The boat proceeded a short distance towards the ship and then turned around and brought the libellant back, notwithstanding that he offered three dollars

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to be put on board the vessel. The ship continued her course out of the harbor without stopping.

The master's account of the occurrence differs from that of the man in a few particulars: 1. He states, as already noticed, that the man was brought ashore at nine o'clock, and not at about half past two or three, shortly before the vessel sailed. He denies having told the man he would go up town to look for the captain of the port, and states that he told the latter several times that he was about to sail and wanted the man, but the captain refused to give him up, saying he would look out for him, and would put him in jail. The captain made no investigation and assigned no reason for keeping the man. The master then returned to the vessel and was under way in fifteen minutes after he got on board.

With respect to this statement it is to be observed: 1. That assuming it to be true, the master's justification is by no means clear.

The policy of the laws of all maritime nations, and notably of the United States, discountenances in the most emphatic manner the discharge of seamen in foreign ports. By various acts of Congress, it is provided that the master shall, before sailing, give bond for the return of his crew to the United States. If a seaman be discharged abroad, he is in general required to pay to the consul three months' extra wages, of which two-thirds are to be paid to the seaman upon his engagement on board any vessel to return to the United States. The remaining third to be retained to form a fund for the payment of the expenses home of other destitute seamen. Consuls are also required to provide passages to the United States for any destitute American seamen found within their districts. Masters are required to receive on board their vessels, and transport to the United States, on the request of the consul, such seamen in number not exceeding two to every one hundred tons burden of their vessels. And, finally, the malicious forcing on shore, or leaving behind, of any mariner in any foreign port or place is denounced and punished as a crime.

These various provisions clearly exhibit the deep solici-

tude of the legislature to secure in all cases the return of the mariner to the United States, and they indicate with equal clearness the duty of the master, viz., to bring back the mariner in his vessel, unless the circumstances are such as to render it impossible, or to relieve him from the obligation to do so.

It is not pretended that in the case at bar the master had any right to expel the seaman from the vessel. The defense rests upon the allegation that the seaman was in the custody of the local authorities from which the master was unable to liberate him. But the inquiry arises, did the master, on his own showing, make a reasonable and sincere effort to perform what, as we have seen, the law regards as one of his most important duties.

The man, he says, was brought on shore at nine o'clock; the vessel sailed at three P. M. He had been sent for by the captain of the port without any complaint on the part of the master, as the latter asserts. But he admits that he went to the captain of the port and "told him just how the thing was." It is not to be presumed that his narrative was very favorable to the seaman. The captain of the port at once dispatches a policeman to bring him ashore. To this proceeding the master makes no opposition. The man is brought on shore, and the master, as he says, requested the captain of the port "several times" to give up the man; and on his refusal, and without delaying his intended departure a single hour, sails away, leaving the man without clothes or money in a remote foreign port. I cannot consider that the master, under these circumstances, fulfilled his whole duty. A more resolute effort should have been made, and more decided measures taken, to procure the restoration of the man, and the departure of the vessel reasonably delayed for the purpose. I have little doubt that such an effort would have been successful. Had the man been a relative or ward of the master, or had a valuable bale of merchandise been removed from the ship, the master's reclamations would, I doubt not, have been far more energetic and persistent, nor would he have deemed the reasons he now assigns for not bringing back the man

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to his port of shipment a valid excuse for failing to deliver any part of his cargo to its owner. I consider his duty to restore the seaman to his home quite as imperative as his duty to deliver his cargo to its consignees.

If the account of the transaction given by the libellant be accepted, the master's breach of duty can hardly be denied. The man swears that he was taken on shore not more than an hour and a half before the vessel sailed; that when the master went off to the ship he said he would be back in half an hour; instead of doing so, he at once made sail. He denies that he was in custody, and states that when he discovered the vessel was about to sail, and mentioned it to the captain of the port, the latter told him to wait until the master came ashore. The man was certainly sufficiently at liberty to be able to make an effort to reach the vessel in a boat. But the boat, after proceeding a part of the way, turned back, against the remonstrances of the man, and in pursuance, he thinks, of previous instructions by the captain of the port. This circumstance seems to me extremely suspicious. It suggests very strongly the idea of a secret understanding between the master and the captain of the port, by which the former was to be rid of the man—an idea, favored by the facts that the master had had trouble with him, and had received on board two stow-away seamen by whom the libellant's place could be supplied. On the master's statement, the conduct of the captain of the port is unaccountable. The man had committed no violation of the municipal law of the place. The vessel lay a mile from the shore. A difficulty, such as are unhappily too common on board ships, had occurred between the master and one of the men. The offense, if any, was against the discipline and internal police of the ship. What motive had the captain of the port to seize and hold the man, when the master had made no complaint against him, when he was anxious to receive him back, and the man was desirous of returning, and this without any investigation whatever into the facts of the case? None has been suggested, except the mere wantonness of brief authority. I require more convincing proofs than have been furnished in

this case, to induce me to believe that from such a motive, without any personal interest or hope of advantage to himself, an officer charged with important duties in a foreign port, and who was on friendly terms with the master (for the latter testifies that he shook hands with him, and bade him good-bye when he left), would have been guilty of so high-handed an outrage upon the commerce of the United States. If the master really supposed the officer was committing the offense he now charges upon him, the cordiality of his leave-taking is not a little extraordinary. Nor does the subsequent conduct of the captain of the port toward the man in any degree tend to corroborate the master's version of the occurrence. On the man's return from his unsuccessful attempt to reach the vessel, he was not consigned to a jail, or subjected to the slightest restraint of his liberty. He applied at once to the captain of the port for a passage to San Francisco, but this the latter declared himself unable to afford him; but when some six days afterwards the man procured a passage on a mail boat for Callao, the captain of the port gave him a letter to the American consul at the latter place, who paid his board while at Callao, and gave him, on his départure, a letter to the consul at Panama, by whom, in like manner, his board was paid until a passage to San Francisco could be obtained.

It seems highly improbable that an officer who was thus ready to do everything in his power to facilitate the man's return to his country, would have forcibly taken him from the vessel and detained him in custody against his own wishes, and in spite of the remonstrances of the master. After a careful consideration of the whole case, my opinion is, that the master desired to be rid of the man, and voluntarily abandoned him. And the defense now set up that he yielded to authority he was unable to resist, is not sustained by the proofs.

In this view of the case, it is unnecessary to consider whether if the facts had been as alleged by the master, the seaman would not still have been entitled to his wages up to the end of the voyage. A decree will be entered in favor of libellant for his wages up to the end of the voyage, and his expenses, deducting intermediate earnings, if any.

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THE BARGE MARY ELIZABETH.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 8, 1875.

1. LIEN FOR WAGES DISALLOWED.—Where the owner of a vessel agreed to sell her to two purchasers for a certain sum, to be paid for in monthly installments, and gave immediate possession to the vendees; and it was further agreed that in case of default in the payments, the vessel should be returned to the owner, and the contract of sale rescinded; and the proposed purchasers were in that case to pay \$125 per month for her use, while in their possession, deducting all sums paid on account of the purchase money, and default was made in the payments stipulated; but before the owner resumed possession under the contract, the libellant sold out his interest to his partner and was immediately employed by the latter to serve as pilot and mate: *Held*, that the libellant had no lien on the vessel in the hands of a subsequent vendee of the owner.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, proctor for libellant.*Charles Page*, proctor for claimants.

HOFFMAN, J. The libellant in this case has proved that he served on board the above barge as pilot and mate from July 8 until August 28, 1874, at the rate of one hundred dollars per month, as agreed on between himself and Captain Bradbury, her acting master.

The defense relies on the following facts: On the fifth day of January, 1874, the Sacramento wood company, the owner of the barge, entered into a contract with the libellant and Captain Bradbury, by which they agreed to sell her for the sum of eight hundred dollars, to be paid for in monthly installments. Captain Bradbury and the libellant, on their part, agreed to purchase and pay for the barge as stipulated in the contract.

It was further agreed that should default be made in any of the payments, the barge was to be immediately returned to the possession of the company, the obligation on its part to convey title to her should cease, and the proposed pur-

chasers were to be charged, and they agreed to pay, rent at the rate of one hundred and twenty-five dollars per month for the time she might have been in their possession, but credit was to be allowed on such rent for all sums paid on account of the purchase-money. It was also agreed that if the barge were lost before the full payment of the purchase, the loss should fall on the purchasers, and they should remain liable for the purchase-money.

Under this agreement Bradbury and the libellant took possession of the barge, and employed her in connection with the steamer Alvarado, with the owners of which they had made a somewhat similar contract.

They failed, however, to make the stipulated payments to the company, but the possession was not demanded by, nor surrendered to, the company, nor were any steps taken to assert the rights of the latter until August 27, when the barge was sold to one Carroll, to whose vendees it was delivered by Captain Hutchins, who had bought out Bradbury's interest in the original contract.

On the eighth of the previous July, after the default in the payments had occurred, and while the barge still remained in the possession of Kates (the libellant) and Bradbury, Kates sold out his interest in the contract to Bradbury, and was immediately employed by the latter to serve as pilot and mate. He now claims that his demand for wages constitutes a lien on the barge in the hands of purchasers who derive title from the wood company.

But this claim cannot, in my opinion, be maintained. It is obvious that if the lien exists against the vessel in the hands of her present owners it would equally have existed against her if she were still owned by the wood company—and this whether the vendees of the company had or had not notice of Kates' claim. The lien was created, if at all, by his service on board the vessel, and not by the fact that the vendees of the company knew of his services. A lien may sometimes be lost by a transfer to a purchaser for value and without notice, but it cannot be created by the fact of such notice if it otherwise had no existence. If the vessel was free from the lien when the company resumed

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possession, the protection of its rights demands that it should be able to convey an unincumbered title to purchasers. If a mere notice of Kates' claim to a party proposing to purchase would subject the vessel in his hands to the lien, the effect would be the same as if she were subject to the lien in the hands of the company, her value in its hands would be diminished to the amount of the lien. But the point is too clear to need argument.

Could then the libellant, in the relation in which he stood to the owners of the vessel, acquire a lien upon her by virtue of services rendered in the employment of his associate after an assignment to the latter of his interest under the contract. It cannot, I think, be pretended that before that assignment either Kates or Bradbury could have acquired any lien for their services on board the vessel. They were not employed by the owners, and were rendering no services to them. They were on board a vessel of which they were the provisional owners. They had agreed to pay for her, and were put into possession to run her on their own account, and at their own risk. If she should be lost, the loss was to fall on them. In case of default in the payment of the purchase money, they were to pay a monthly rent for her use, and immediately surrender her to her owner.

They were thus *quasi*, or provisional, owners of the barge, or *quasi* hirers of her. But in either case their services were rendered to themselves, and for their own benefit, and not to or for the benefit of the legal owner.

If an owner of a vessel of which he retains the possession takes service on board of her as mate or seaman, it is plain that he could not assert any lien upon her for his wages; his wages would be due from himself to himself. There would, therefore, be no debt to support the lien, or for which it could serve as security. The same consequence would follow, and for the same reason, if the person rendering the services were the charterer in possession.

It may be objected that these instances furnish no argument, for they merely present this question in dispute

under another form. This objection has some plausibility, but these simple illustrations serve to point out what is the true principle to be applied to the case at bar where the circumstances are more complicated. I think it plain, therefore, that before the assignment Kates could have acquired no lien on the vessel. Did the fact that he assigned his interest in the contract to his associate alter his position with regard to the owners, or enable him to acquire, or his associate to create, a lien in his favor on the barge? It appears to me that it did not. His assignment to his partner conveyed his rights, but it did not relieve him of his obligations under the contract. The contract was not by its terms assignable. The company bound itself to sell and give title to Bradbury and Kates on receiving from them the purchase money. It did not agree to sell to their assignee. It may have been content to assume the risk of liens created by them in favor of strangers, but it could not have contemplated the creation by them of liens in their own favor on a vessel of which they were the provisional owners, and were bound, by paying the purchase money to become the absolute owners. And this result could not be brought about either by a joint assignment to a third party nor by assignment by one associate to the other; neither could, without the company's consent, alter his relation to the vessel or to the company. That relation, as established by the contract, remained unaffected by any assignment to which the company did not assent, and which it was under no obligation to recognize for any purpose; and especially when resorted to for the purpose of enabling one of the purchasers to impair, and it might be wholly absorb, the value of the property by creating liens upon her in favor of his associate.

My opinion is, that under the circumstances, no lien attached to the vessel in favor of the libellant. Under this view of the case, it will be unnecessary to consider the novel, and, perhaps, embarrassing questions, which arise from the circumstance that the libellant's services were rendered to the barge and the steamer jointly; both ves-

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sels being engaged in a common enterprise, in the prosecution of which both were necessarily used, and which were taken possession of by the libellant and his associate under nearly similar contracts, but with different owners. In the contract with the owners of the steamer they appear to have stipulated against the creation of any liens whatever upon her. Disregarding for the moment this latter provision, the inquiry arises: to which vessel did a lien for services rendered to both, attach; or did it attach to both? Could they be libelled jointly, or would each be liable for the whole? And if not for the whole, how should the proportionate liability of each be determined? Or, if the whole debt was collected from one, could contribution be claimed from the other? And if so, whether for one half of the amount paid, or for a part of it, proportioned to the relative values of the vessels? These and other questions naturally suggest themselves, but it is unnecessary now to attempt to solve them.

The libel must be dismissed.

MARCUS NEFF v. SYLVESTER PENNOYER.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 11, 1875.

1. **TREBLE DAMAGES.**—In an action for cutting or carrying away timber from the land of another to entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint, so that the defendant may be apprised of the claim, and the facts stated in the complaint must bring the case within the statute. (Or. Civ. Code, Sec. 385.)
2. **DEFENSE TO CLAIM FOR TREBLE DAMAGES.**—The defense to a claim for treble damages in such an action must be pleaded, and it may be either: 1. That the trespass was casual or involuntary; 2. Or that, at the time of the commission thereof, the defendant had probable cause to believe that the premises were his own, or those of the person under whom he acted; 3. Or that the timber was taken from uninclosed woodland for the purpose of repairing a highway or bridge. (Or. Civ. Code, Sec. 336.)
3. **IRRELEVANT ALLEGATION.**—An allegation which merely contains facts tending to prove either of said defenses is irrelevant and will be stricken out on motion.

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4. COUNTER-CLAIM.—A counter-claim is substantially a cross-action and should contain nothing but the facts necessary to constitute it; and if any other defense is inserted therein it may be stricken out.
5. TAXES PAID BY PARTY IN POSSESSION.—In an action for damages for withholding the possession of real property, if the defendant held under color of title in good faith adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding are a proper subject of counter-claim.
6. DAMAGES FOR WITHHOLDING POSSESSION AND DEFENSE THERETO.—In action to recover damages for wrongfully withholding the possession of real property, the plaintiff may allege and recover for any particular waste or injury committed by the defendant thereon during his possession, or he may omit all claim other than that arising from such waste or injury, but he cannot by so doing preclude the defendant from showing that the alleged waste or injury was committed while he was in the possession of the premises, claiming title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts.
7. IMPROVEMENTS—COUNTER-CLAIM FOR.—To enable a defendant to maintain a counter-claim for the value of improvements made upon the premises of another, it must appear therefrom that the improvements are affixed to the freehold and still existing, and that they better the condition of the property for the ordinary purposes for which it is used; and that they were made while the defendant, or those under whom he claims, were in possession under color of title, in good faith, adversely to the claim of the plaintiff. (Or. Civ. Code, Sec. 318.)
8. SAME SUBJECT.—A counter-claim not containing these allegations, but only a statement of facts tending to prove them, will be stricken out as irrelevant.

Before DEADY, District Judge.

Motion to strike out counter-claim.

M. W. Fechheimer, for the motion.*H. Y. Thompson*, contra.

DEADY, J. This action is brought by the plaintiff as a citizen of California, against the defendant, a citizen of the State of Oregon, for wrongfully entering the plaintiff's close—a tract of land situated in Multnomah county, Oregon—on May 10, 1869, and on divers other days and times between that day and March 9, 1875, and then and there cutting and carrying away the trees and timber therefrom, and converting the same to his own use, and for then and there

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pulling down and destroying a certain log dwelling-house thereon; and also for removing and destroying a certain fence inclosing an orchard growing thereon, whereby stock and cattle entered upon said orchard and destroyed the same, to the damage of the plaintiff \$4,600.

The answer of the defendant consists of a denial of the material allegations of the complaint, except the one concerning his own citizenship, and a counter-claim styled "a further and separate answer," in which it is alleged that the defendant entered into the peaceable possession of the premises on January 14, 1867, as a purchaser at a sale made upon an execution, issued out of the Circuit Court for the county and State aforesaid, upon a judgment wherein J. H. Mitchell was plaintiff and the plaintiff herein defendant, and that he occupied them in good faith as such purchaser until 1875, when he was evicted therefrom upon a judgment of this court; that during such occupation he paid \$121.55 of taxes duly levied upon said premises and erected thereon a board cabin which still remains, at a cost of \$35; that he removed certain fallen and standing timber from said premises for the purpose of clearing a portion of them for pasture, and that said clearing was a benefit to the premises, and worth the sum of \$600.

The plaintiff moves to strike out four separate parts of the counter-claim, which taken together constitute the whole of it, as being irrelevant and redundant. The first allegation asked to be stricken out is the one concerning the circumstances under which the defendant entered and occupied the premises. On the argument it was assumed that this allegation was inserted in the counter-claim to show that the trespass complained of is not within section 385 of the Or. Civ. Code, which provides, that in case of trespass by cutting or carrying away "any tree, timber or shrub on the land of another * * * without lawful authority, * * * if the judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor as the case may be." Counsel for the plaintiff disclaims the right to recover treble damages in this action, the demand in the complaint being for single damages only.

To entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint, so that the defendant may be apprised of the claim, and the facts stated must bring the case within the statute. (*Newcomb v. Butterfield*, 8 John, 345; *Chapman v. Emerie*, 5 Cal., 239; *Mooers v. Allen*, 2 Wend., 247.)

The case made by the complaint being for single damages the allegation in question is so far irrelevant and ought to go out. But if it had been otherwise the allegation would be irrelevant. Where an action is brought for cutting timber, on the land of another, without authority, the defense against a claim for treble damages must be pleaded, and it may be either: 1. That the trespass was casual or involuntary; 2. Or that, at the time of the commission thereof, the defendant had probable cause to believe the premises were his own or that of the person under whom he acted; 3. Or that the timber was taken from uninclosed woodland for the purpose of repairing a highway or bridge. (Or. Civ. Code, Sec. 336.)

The second one of the defenses appears to have been in the mind of the pleader when this allegation was drawn, but instead of alleging directly that at the time of cutting the timber the defendant had probable cause to believe the premises were his own, the circumstances of the purchase and entry are detailed, from which it may be inferred that he had such cause so to believe. This is pleading the evidence—the probative facts instead of the ultimate ones. Therefore, as a pleading it is irrelevant. Besides, this allegation considered as a defense to a claim for treble damages, is improperly inserted in a counter-claim. It should have been pleaded separately. This counter-claim for taxes paid and improvements made upon the premises is in no way dependent upon the plaintiff's claim for treble damages or the defendant's defense to it. A counter-claim is substantially a cross-action and should not contain anything but the facts necessary to constitute it. If the defendant has any other defense to the action, either absolutely or as to the demand therein for treble damages, he must plead it separately.

As to the payment of taxes by one who holds the prem-

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ises under color of title in good faith, adversely to the claim of another, I think, it is a proper subject of counter-claim in an action by the true owner for damages for withholding the possession of the premises. It is a cause of action arising out of the transaction set forth in the complaint—the occupation of the premises by the defendant. As was said in this court in *Stark v. Starr* (1 Sawyer, 30), “The expenditure was not made voluntarily by the defendant, but in obedience to the law and for the benefit of the property, and consequently its owner. It is the duty of a party in possession of property, claiming title or interest therein to pay all lawful taxes and charges imposed thereon by public authority. If he neglect to do this, and purchase the property at a sale for these taxes, he acquires no right thereby, because his conduct is deemed fraudulent as against the true owner. As it turns out, these taxes were paid by the defendant for the benefit of the plaintiff. If the former had not paid them the latter must, or allowed the property to have been sold as delinquent. Therefore in estimating the damages to which the plaintiff is entitled for being kept out of possession, the amount of the assessment must be deducted from the gross rents, and the remainder is the true profits or damages.” (*Bright v. Boyd*, 1 Story, 478.) It is true that the plaintiff in this action has not sued for mesne profits or damages for withholding the premises *eo nomine*, but for certain trespasses alleged to have been committed thereon by the defendant. But if the fact is, as stated in this counter-claim, that the plaintiff was at the time in the occupation of the premises as a purchaser in good faith at a sale upon an execution against the property of the plaintiff, then this is substantially an action to recover damages for withholding the possession of the premises, in which the plaintiff may also recover for any particular waste or injury committed by the defendant thereon during his occupation. (1 Chit. Plead. 225.)

In such action the plaintiff may omit all claim for damages other than those arising from the alleged waste or injury to the premises, but he cannot by so doing preclude the defendant from showing that such waste or injury was

committed while he was in possession of the premises claiming the title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts.

To enable the defendant to maintain a counter-claim for the value of improvements made upon the premises it must appear therefrom that the improvements are permanent—affixed to the freehold and still existing—and that they ameliorate or better the condition of the property for the ordinary purposes for which it is owned and used, (*Stark v. Starr, supra*, 26); and that they were made while the defendant or those under whom he claims were in possession under color of title in good faith, adversely to the claim of the plaintiff.

Here, the allegation in the counter-claim, as to the circumstances under which the defendant entered and held possession of the premises as has been stated, contains facts tending to show that the defendant occupied under color of title in good faith, adversely to the plaintiff, but the proper mode of pleading is to allege such facts directly and not other ones tending to prove them.

From the facts stated concerning the alleged improvements it appears that the clearing of the portion of the land for pasture was and is a benefit to the premises, but it does not appear that the cabin is any benefit to the property or what its present value is.

The motion to strike out is allowed as a whole.

JAMES T. KIELLEY v. BELCHER SILVER MINING Co.

CIRCUIT COURT, DISTRICT OF NEVADA.

OCTOBER 13, 1875.

1. NEGLIGENCE OF FELLOW-SERVANT.—Where an injury results to a party from the negligence of a fellow-servant, in the same line of employment, there is no liability on the part of the employer, provided he has exercised due care in the selection of his servants.
2. SAME EMPLOYMENT, WHAT?—Where several persons are employed in a mine, some breaking down the ore with picks and by blasting, and

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others at the same time loading and wheeling out the ore so broken down, those so engaged in breaking down the ore, and in loading and wheeling it out, are fellow-servants in the same line of employment, within the rule.

3. **KNOWLEDGE OF DANGERS.**—Where a party employed in a dangerous occupation, wherein insufficient means are provided for avoiding the dangers, with full personal knowledge of all the dangers, and of the want of proper means for guarding against them, voluntarily continues in such employment, he assumes the risk, and he cannot recover against his employer for injuries resulting from such known dangers, and known want of proper means for avoiding them.
4. **ADVISING VERDICT.**—Where, upon the evidence, the court is satisfied that there should be no recovery, and that a verdict, if found for the plaintiff, would necessarily be set aside for want of evidence to justify it, the jury will be advised to find for the defendant.

Before **SAWYER**, Circuit Judge, and **HILLYER**, District Judge.

Action against the owner of a mine for injuries sustained in the mine through the negligence of a fellow-workman in setting off a blast without giving sufficient notice to the plaintiff. At the close of the plaintiff's testimony, the defendant's counsel moved the court to advise the jury to find a verdict for defendant, upon the ground that the evidence taken as true, and most strongly in favor of the plaintiff, would not justify a verdict in his favor. The court, after argument, so advised the jury.

The other facts sufficiently appear in the opinion of the Court.

Lewis & Deal, for plaintiff.

Whitman & Wood, for defendant.

By the Court, **SAWYER**, Circuit Judge: We have considered as carefully as the time and circumstances will admit, the motion made by the defense at the close of plaintiff's testimony to advise the jury to find a verdict for defendant. There are two points necessary to decide on this application. It is first claimed that the accident resulted from the negligence of a co-servant, engaged in the same common employment; and, being the result of the negligence of this co-servant, that the defendant is not

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liable for his acts. Conceding, then, this accident to have resulted from the negligence of a co-servant in the same line of employment, what is the rule of law applicable to the case? There is no doubt that the general, and in fact the entire line of decisions, with scarcely an exception, is to the effect that in such case there is no liability. There is a case, it is true, in Scotland, where the doctrine is repudiated; that case is valuable simply so far as it affords an argument against the rule. The case itself was reversed by the House of Lords, on appeal. There is a case in Kentucky, where the court limits the rule, and throws out some remarks of disapprobation, but the whole line of decisions and authorities upon the point, where the question has arisen and been directly decided is, that where the negligent party is a co-servant in a common employment within the meaning of the rule, there is no liability. The Supreme Court of the United States has not passed upon the question, it is true, so far as we are aware, but the highest courts of almost every State in the Union have passed upon it. It has been passed upon many times in England, and the authorities, as we have stated, generally deny the liability. If there be an exception, it is but an exception to the great array of judicial decisions. The only question remaining in this case is: Was Kielley a co-servant, engaged in a common employment with the parties that were letting off the blast, within the meaning of the rule? Upon that point we have no doubt whatever—no doubt that he is a co-servant within the meaning of the rule. If he is not, it would be very difficult to determine who would be a co-servant within the rule. He was engaged in the business of mining—of taking out ore from the mine. The other parties Webber and Glenn, were breaking down the ore, either with a pick or by blasting—at this particular time by blasting—and that same ore that they were taking out was loaded in barrows and wheeled away by the plaintiff and others. They were all engaged in that common employment of removing ore from the mine. Blasting it out or breaking it down with a pick is but one stage in the process of removal; putting it in condition to be loaded in the barrow to be

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wheeled out is another. Those engaged in breaking down, and those in loading and wheeling, were engaged in different parts of one common employment. They were engaged in a work tending to a common object, one common end, and in connection with each other, each having a relation to the object, and to the common end; one breaking down and loosening the ore, and the other removing it from the mine. If this accident was the result merely of the negligence of Webber and Glenn, they being co-servants engaged in a common employment, then, under the rule as stated, and as established by the authorities, the defendant is not liable; and we do not think the Supreme Court, when it comes to consider this question, can come to any other conclusion, unless they overrule the general current of authorities; we might say, the unbroken current of authorities on that precise point. It is claimed, however, by the plaintiff, that there is something broader than this. It is claimed that the accident is not merely the result of the negligence of Webber and Glenn in letting off the blast without giving proper notice, but that it is the result of the negligence of the company, in failing to establish general rules or regulations providing some further means than were customary in that mine of giving notice of a blast. It may be a question here—and we are inclined to think it is, but we do not propose to put the decision upon that ground—it may be a question, whether the whole is not involved in the negligence of Webber and Glenn. If it was their duty to give notice, it was their duty to give sufficient notice, independent of any general or particular regulations, and a neglect to do so would be their neglect.

But still, we shall assume—and there is some plausibility in the point—that there is something in it broader than the negligence of Webber and Glenn; that it was the duty of the company to make other regulations, additional and further regulations, for affording means of notice other than those that were ordinarily adopted in this mine. Then we come to this position: The plaintiff, upon his own testimony—for we must take his own testimony as he gives it—and taking it in the light most favorable to himself, upon his own

showing, knew the mode in which this ore was loosened; that it was by blasting. He had at times been engaged in blasting himself; he was wheeling ore out after the blasts. In this particular case he knew that the ore, if there was any there, on the twelfth floor, was the result of a blast. He said he supposed that the blast had already gone off, from the fact of there being ore there; but he knew that the mode of preparing the ore for its reception in the wheelbarrow was by blasting. He knew, because he tells us so, what the customary mode of notifying parties of an impending blast was, and that was by calling out "fire." This he understood to be the customary mode. He knew, according to his own statement, that no other precautions were taken; he knew that no lights were placed at the point of the contemplated blast, and he knew that no bells were placed in the cooling-room, because that was a matter of conversation between him and his co-laborers. He knew the number of men that were provided to notify those approaching, as it was also a matter of conversation between them; that the means of notification were insufficient, and it was suggested, among other things, that bells might be arranged in the cooling-room, to give notice of the coming blast. Now, having knowledge of all those matters, he still does not seem to have complained to the defendant, but having that knowledge, and knowing the only means that were ordinarily taken to give notice of a blast, and knowing that those were insufficient to obviate all danger, he still continued in that employment. He had no reason to expect that any other notice would be given. He knew that no other was usually given, and that it was insufficient, and, under the authorities, we think that he went on with the business and assumed the risks which he knew attended it. It is not a matter of ignorance with him. In fact, he knew the means afforded for giving notice of danger, and beyond these he assumed himself the responsibility of guarding himself against the dangers resulting from the blasting. We think it is entirely and clearly within the case of *McGlynn v. Brodie*, 31 Cal. 376, and the cases there cited. This is not a matter of general reputation for neglect on the

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part of defendant, as claimed by counsel for the plaintiff—general reputation for carelessness; it was a knowledge of the actual mode of doing this particular business in this particular mine. He knew where they were blasting, according to his own testimony. He knew the mode of their taking the ore out; he knew in what the danger consisted; he knew that there was a blast liable to be set off at any time. He had been engaged in this work for a long time, engaged in that employment some months; and it was with reference to this subject of blasting that the discussion took place in regard to placing signal-bells in the cooling-room, to which they resorted in their daily work, and having reference to the blasting that was done as a means of loosening the ore which he himself was wheeling out. It was, therefore, a special knowledge in regard to this particular matter, and not a general reputation, not a general report, but knowledge of the precise circumstances under which he was working, and of the danger to which he was subject. It was with that knowledge, and with the full knowledge of the only means that were taken to advise him of impending danger, and that he had no reason to expect any other warning, he went on with the work, and, we think, under the law, he assumed the risk, assumed to take such precautions himself to ascertain when a blast was going off as were necessary, beyond those which were customary in that mine, and which he knew to be customary. We think, therefore, it is within the case referred to, and the authorities do not seem to be conflicting upon that point; they seem to be all one way. So far as they have been called to our attention, none seem to conflict with the case of *McGlynn v. Brodie*, and the cases there cited.

Then, taking the facts as stated by plaintiff himself, taking them in the strongest light in his own favor, we do not think he has made out a case that would justify us in giving it to the jury. We think, upon these points, that if the jury should find against the defendant in this case, the court would be compelled to set aside the verdict for want of evidence to support it. The motion, therefore, must be granted.

This is a hard case—undoubtedly, a very hard case; but

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still, the rules of law are rigid, and we are bound by them. We very much dislike to take any case from the jury, where there is anything that is proper to submit; but it would be, in our judgment, only consuming further time to no purpose if we were to go on with this case. We think, under the rules of law as established, and which we cannot abrogate, which we are not authorized to overthrow, that this case must be taken from the jury and the motion granted.

The jury, by direction of the court, found a verdict in favor of the defendant.

LYDIA C. HALL v. EDWIN RUSSELL ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 12, 1875.

1. ESTATE OF SETTLER UNDER DONATION ACT. — A settler under the Donation Act of Oregon before the completion of the residence and cultivation required by the act, had neither a descendible nor devisable estate in the donation; and upon his death prior to such completion, his interest in the premises ceased, and the same was granted by section 8 of said act to the heirs and widow, where one was left, of such settler, who took the land not as the heirs of the settler, but as the donees of the United States.
2. SAME SUBJECT. — In April, 1852, L., who had been a resident of Oregon prior to December 1, 1850, became a settler under the Donation Act upon the public lands, and made the necessary notification and proof of the commencement of his residence, and died in January, 1853: *Held*, that upon the death of L. the premises passed, by virtue of section 8 of the Donation Act, to the heirs of L. as the donees of the United States, and that his devisees took no interest in the property.
3. STATUTE OF LIMITATIONS. — In cases of concurrent jurisdiction, equity follows the law as to the Statute of Limitations; but in cases of purely equitable rights and titles equity is not bound by the statute, and only acts in analogy to it.
4. SAME SUBJECT. — The limitations of the several States in regard to actions at law are made applicable to like actions in the national courts by section 721 of the R. S., but this does not include special limitations concerning suits in equity, and therefore section 378 of the Oregon Civil Code prescribing a limitation of five years as to a suit in equity to affect a patent to land is not binding upon this court.

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5. APPLICATION OF STATUTE TO A SUIT IN EQUITY.—In May, 1866, a patent was issued to W. H. and J. Delay for the premises settled upon by L. in April, 1852, as the heirs of Joshua Delay, in pursuance of an alleged settlement upon the land by said J. D. subsequent to the death of L., in January, 1853; and in October, 1875, the devisees of said L. brought suit to charge the defendants, the assignees of said patentees, as trustees of the plaintiff, and to compel them to convey the premises to them as the successors in interest to L., the true and first settler; and it not appearing that the plaintiffs had ever been misled or deceived by the defendants or induced to forbear the assertion of their alleged rights, or that any relation of trust or confidence ever in fact existed between the parties, but it appearing that they claim under titles adverse in their origin: *Held*, that the limitation provided by section 378 of the Oregon Civil Code to suits in equity in the State court affecting a patent, ought to be applied to the suit in this court.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

The case is fully stated in the opinion of the Court.

W. W. Chapman and *James G. Chapman*, for the complainant.

W. W. Page and *G. W. Yokum*, for the defendant.

By the Court, DEADY, J. The plaintiffs, the widow and children of Samuel Parker Hall, deceased, and W. W. Chapman, the administrator, with the will annexed, of the estate of J. L. Loring, deceased, bring this suit to have the defendants, Edwin Russell and wife, W. W. Page and wife, and George H. Williams, declared the trustees of the plaintiffs in regard to a donation situated in Multnomah county, being parts of sections 26 and 27 of T. 1, R. 1 E., in Wallamet district, and containing 289.47 acres.

Among other things the bill states, that at Cincinnati, on August 20, 1849, said Loring made his last will, by which he devised all the property, except certain legacies, of which he might die seised or possessed to said Samuel Parker Hall; that before December 1, 1850, Loring became a resident of Oregon, and in April, 1852, became a settler under the Donation Act of September 27, 1850, upon the tract of land aforesaid, and during the same month notified the surveyor-general thereof, and made the necessary proof of the

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commencement of his residence and cultivation, and that the same was for his own use; that Loring continued to reside thereon until his death in January, 1853, having up to said time, complied with said Donation Act in all respects; that a few weeks before his death Loring took Joshua Delay and Sarah his wife to live upon the premises with him as a tenant or cropper, where they remained as such until the death of Loring, after which said Joshua claimed the premises as a settler thereon under said Donation Act, and afterwards, said Joshua and Sarah having died in the meantime, on May 9, 1866, a patent was issued to W. H. and Joseph Delay for the premises, as the heirs at law of said Joshua and Sarah, that said patent was issued upon the fraudulent representations of said Delay and his heirs, and in fraud of the rights of the heirs of said Loring, to whom it should have issued—of all which the defendants, and those through whom they claim, had notice. That in October, 1871, the heirs at law of said Loring brought suit to recover the premises from the defendants in this suit upon the ground that said patent was wrongfully issued to said Delay heirs, as aforesaid; and thereupon, in October, 1872, said heirs in consideration of the sum of \$5,000, conveyed all their interest in the premises to the defendants; that the true value of said premises is \$100,000, and the rights of said Loring heirs therein are subordinate to those of his devisees, of which the defendants had notice.

That at the death of said Loring the existence of the will aforesaid was not known in Oregon, and said W. W. Chapman was duly appointed administrator of said Loring's estate, and as such made proof, under section 8 of the Donation Act, of the compliance of said Loring as a settler upon said premises with said act up to the time of his death before the proper land office, whereupon the register and receiver thereof, on October 27, 1864, issued a certificate for said donation to the heirs at law of said Loring, and disallowed the adverse claim of the Delay heirs thereto; that the commissioner of the general land office affirmed this action of the local land office, but the same was set aside by the Secretary of the Interior, and the patent was issued to the

Delay heirs as above stated; and that on July 20, 1871, said will was duly admitted to probate in the County Court of Clackamas county, and said Chapman appointed administrator, with the will annexed, of the estate of said Loring.

The defendants demur to the bill, and assign several causes of demurrer. But two of them will be considered:

1. The plaintiffs have no interest in the subject-matter of the suit, and cannot maintain any suit concerning it; and,
2. The statute of limitations.

The demurrer admits that at the time of his death, Loring was a settler upon the premises under the Donation Act for a less period than four years, but that up to the time of such death he had complied with all the provisions of the act, and that the patent which issued to the Delay heirs was procured by the fraudulent representations of Delay and his sons. If, then, the plaintiffs are the successors in interest of Loring, they are entitled to the relief sought, unless the lapse of time shall be considered a bar to it.

Under section 4 of the Donation Act, Loring was qualified to take 320 acres of the public land in Oregon. The donation was made by the act in words of present grant, subject to the performance of the conditions of four years' residence and cultivation and proof of the same. Until the performance of these conditions, the estate granted being a defeasible one, was liable to revert to the donor, except where the performance became impossible by the death of the settler, in which case the common law would have excused the failure to comply with the act, and thereupon the estate would have become absolute, and descended to his heirs as a fee simple. (2 Black. 156; 4 Kent, 127; *Delay v. Chapman*, 3 Or. 462.)

Now this contingency was not left by the Donation Act to the operation of the general law, but was provided for in section 8 of the act as follows:

“Upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act, shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance

with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

In view of this provision of the act, had Loring a devisable estate in the premises? We think not. His interest therein terminated with his death, and thereafter he had nothing to dispose of. Upon his death, without leaving a widow, and before the completion of his residence and cultivation, this section of the act limited the property over to his heirs—said it should descend to them—in effect *gave* it to them in consideration of the service and death of their ancestor. They are not in as the successors in interest of Loring, but take the land as the donees of the United States. The patent issues to them by name or by some descriptive phrase—as, "the heirs of Loring," under which they are collectively included. The test cited by Jarmyn on Wills, 88, applies. An estate not descendible is not devisable. Nor could Loring have disposed of this property by sale in his lifetime. The third proviso to section 4, which was in force during his residence on the land, declared void all future contracts made by a settler prior to the receipt of his patent, for the sale of his donation. And independent even of this prohibition any contract for or sale of the land before the completion of his residence and cultivation, would have been of no further force or effect upon the happening of the contingency provided for in said section 8.

Nor is there anything in the general policy or purpose of the act tending to show that it was the intention of Congress to permit a settler to devise his donation before it had become unconditionally his, by the completion of his residence and cultivation. The act (section 4) authorizes or recognizes the right of two classes of persons to dispose of their donations by will: 1. Married persons, who are settlers under said section and have complied with the provisions of the act and die before patent issues; and, 2. Alien settlers who die before their naturalization is completed. As to the first of these classes, the act merely recognizes the right of the donee to make a testamentary

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disposition of the property according to the laws of Oregon in cases where the act has been complied with. It does not confer it, but assumes that it exists by the local law. The donation having become indefeasibly vested in the donees, it follows that they could have disposed of it by will, if authorized by the law of Oregon, although the act had been silent upon the subject. In short, as to such married persons, the act appears to recognize their right to dispose of their donations by will according to the local law, and only provides for its disposition in cases where they die intestate and before the patent issues.

As to the second class, it is admitted that the language of the act is general enough to include the case of an alien settler dying before the completion of his residence and cultivation. But provision being expressly made by section 8 that "upon the death of any settler before the expiration of the four years' continued possession required by this act," that the donation shall go to his heirs, the general language of this clause in regard to alien settlers ought to be construed, if it reasonably can, so as not to interfere with the specific provision of this section.

This clause in regard to aliens occurs in that part of section 4 which provides for the disposition of a donation where the donee dies after the completion of the residence and cultivation, and before the issue of a patent; and is a proviso to such part. The manifest purpose of the proviso is to provide for the contingency of the death of an alien settler after he had declared his intentions and before he had completed his naturalization. This might happen in a case where the four years' possession had expired. Upon declaring his intention to become a citizen an alien might become a settler; might reside upon and cultivate his donation for four years and make proof of the same and die without completing his naturalization. The failure to complete his naturalization might be the result of neglect on his part or want of time or opportunity. For instance, an alien, who was an occupant of a tract of the public land for four years prior to the passage of the donation act, might under section 4 at once declare his intentions and make his

notification and proofs, but could not complete his naturalization for two years thereafter, in which time he might die. Under these circumstances a patent could not issue for the donation to any one, for the settler not having completed his naturalization had not complied with the act making the grant, and it would revert to the United States.

But having performed the essential service of residence and cultivation upon the land, in consideration of which the donation was made, Congress might well excuse his failure to complete his naturalization, which by his very death would become immaterial and of no consequence to any one, and to permit him to devise his donation, or in default of that provide that it should go to his heirs. But if such alien died "before the expiration of the four years' possession required by the act," with or without having completed his naturalization, then the case falls within section 8, and the property is not permitted to pass to his devisees, but is given directly to his heirs and widow. This construction of this proviso makes the various provisions of the act concerning the disposition of the donation upon the death of the settler before the issuing of the patent harmonize. It goes upon the reasonable and just theory that a settler having completed his four years' residence and cultivation—the material consideration for the grant—he had thereby acquired the *jus disponendi* of his donation, and might devise it in accordance with the local law as he saw proper; but that when a settler has not performed the conditions of residence and cultivation, such right of disposal did not attach to him, and therefore Congress might justly dispose of the donation at his death. It also places all settlers upon the same footing, and avoids the absurdity of supposing that Congress intended to provide that an alien who had not completed his occupation of the land might, nevertheless, dispose of it by will, while a citizen should not.

But counsel for plaintiff insists that the grant to Loring, taking sections 4 and 8 together, and considering that he died before he had occupied the land four years, leaving no widow, amounts in effect to this, and ought to be so construed: The premises are hereby granted to Loring for life,

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with the remainder to his heirs at law; and that such a grant is within the rule in Shelly's case, which was then and now in force in this State, and therefore the whole estate or unconditional fee of the premises vested in the first taker, Loring, from the date of his settlement, and he might dispose of it by will in disregard of the remainder to his heirs. This argument assumes that by virtue of section 8, the heirs at law of a settler dying intestate, before the completion of his residence and cultivation, take or inherit from him as heirs. But this is clearly not so. The language of the section is open to criticism, but the manifest intention of Congress was to grant the premises occupied by the deceased settler to his heirs. It declares that the rights of the settler under the act shall descend to his heirs.

What were the rights of such settler at the time of his death is not apparent. To all intents and purposes his interest on the premises terminated with his decease. But in any event, the word "descend" as here used evidently means nothing more than pass or go. (*Stephenson v. Hagan*, 15 B. Monroe, 315.) The heirs could not take in conjunction with the widow and take as heirs, because they would then take less than an heir. (*Fields v. Squires*, Deady, 383.)

Neither was this a grant to Loring for life with remainder to heirs in fee. But it was a grant to Loring in fee but upon conditions, and also a contingent or alternate grant of the same premises to his heirs in case he should fail, by reason of his death, to perform the conditions. The settler and heirs in case of his death are thus brought in juxtaposition with regard to the premises, but there is no transmission of the property in the same from the one to the other, as from an ancestor to an heir. The term "heirs" is used merely as a *designatio personarum*, who are to receive the gift. Congress could as well have given it to John Doe and Richard Roe as to the heirs. But in consideration of the partial performance of the ancestor, Congress gave the donation anew to his heirs and widow. They then take the property as the direct donees of the United States, and are in by purchase and not descent. But they must claim the donation, and make proof of the compliance of the ancestor

with the act up to the time of his death, and their relation to him. (*Delay v. Chapman*, 3 Or. 464.) The interest of the settler terminated with his death and the act—which is a law and not a mere conveyance, and therefore is to take effect according to its intention, whether in accord with the rule in *Shelly's case* or not—granted the property directly to the heirs, and provided that a patent should issue to them upon making proof of the facts. Loring settled upon the donation, understanding that if he died before the completion of his residence thereon, that the act provided to whom it should go, and that; therefore, he had no power to dispose of it otherwise by will.

Loring not having a devisable estate in the premises at the time of his death, his interest having terminated with his death, neither his devisees nor his administrator have any interest in the property, and cannot therefore maintain this suit. Upon this point the demurrer is well taken.

We also think that the suit ought not to be maintained on account of the lapse of time. By section 378 of the Oregon Civil Code, it is provided that no suit in equity “shall be maintained to set aside, cancel or annul, or otherwise effect a patent to lands issued by the United States. * * * or to compel any person claiming or holding under any such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust to, or for, the use and benefit of such plaintiff for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent, unless such suit is commenced within five years from the date of such patent, or within one year from the passage of this act.” It has been held that the defense of the statute of limitations could not be made by demurrer, but must be interposed by plea or answer, so as to give the plaintiff an opportunity to reply the facts and circumstances which, in equity, exclude the statute. (3 Atk. 225.) But the rule appears now to be well settled, and with reason, that whenever a bill is so framed as to present the objection of the lapse of time, a demurrer for that cause will lie. (Story's Eq. P., Secs. 503, 760.)

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In cases of concurrent jurisdiction, such as matters of account, etc., where the party may proceed either at law or in equity, the statute of limitations applies with equal force in both courts. In such cases courts of equity consider themselves within the spirit of the statute and act in obedience to it, but in the consideration of purely equitable rights and titles, they act in analogy to the statute, but are not bound by it. (*Robinson v. Hook*, 4 Mas. 150; *Pratt v. Northam*, 5 Id. 112; *Sherwood v. Sutton*, Id. 146; Story's Eq., Sec. 1520.) For instance: When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trust, where it is sought for the purpose of maintaining the remedy, to force upon the defendant the character of trustee, courts will apply the same limitation as provided for actions at law. (*Elmendorf v. Taylor*, 10 Whea. 176; *Miller v. McIntyre*, 6 Pet. 66; *Beaubien v. Beaubien*, 23 How. 207.) The case before the court is one of this class. The right of the plaintiffs, admitting that the devisees under the will took the donation in preference to the donees under section 8 of the Donation Act, depends upon the establishment of an implied trust, to be raised by the law out of the circumstances of the case, and notwithstanding the adverse origin of the defendants' title and the like possession thereunder.

But when it is said that a court of equity will follow the statute of limitations, it is understood that it is a statute of the same forum or jurisdiction, and not that of another State or country. The statutes of limitations of the several States are made the rules of decision in the United States courts, in trials at common law. (Sec. 721 R. S.; *Shelby v. Guy*, 11 Whea. 361; *McCleeney v. Silliman*, 3 Pet. 276.) Now, thereby, these statutes become practically laws of the United States, and the national courts sitting in equity follow them as laws of their own forum or jurisdiction. But the limitation here invoked as a bar to this suit is no part of the laws of the United States. By its terms, it only applies to suits in equity in the courts of the State. There-

fore it does not come within the purview of section 721, *supra*, nor become in any sense the law of this forum. It is a singular case. Our attention has not been called to another like it or to any authority directly bearing upon it.

An action at law to recover possession of this property would not be barred by the laws of this State under twenty years. Whether the court shall follow that statute or the limitations of five years contained in section 378, *supra*, is the question. It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reason, apply a longer or a shorter time in bar of a suit. There is nothing in the circumstances of this case or the period fixed by the statute which requires the court to lengthen the term, but rather the contrary.

The patent was issued nearly ten years ago. The limitation of five years upon a suit of this kind in the State court was enacted on October 22, 1870, and took effect January 24, 1871, nearly five years before the commencement of this suit, October 2, 1875. No reason is given for the delay, nor does it appear that the plaintiffs have been deceived or misled in any way by the defendants, or in any wise induced to forbear the assertion of their alleged rights. There never was any actual relation of trust or confidence between these parties. They claim under titles adverse in their origin, and have always occupied the attitude of adverse claimants. Under these circumstances we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the national and State courts. We think in this case the court may safely adopt the limitation prescribed by the laws of the State in its courts in like cases. Admitting then, that the devise to the plaintiffs was sufficient to invest them with the title to the premises, they must be denied the relief sought on account of the lapse of time.

A decree will be entered dismissing the bill for want of equity, and because of the delay in bringing the suit.

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IN RE C. B. COMSTOCK & Co.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 16, 1875.

1. WITNESS BEFORE REGISTER.—A witness summoned before the register on the application of the assignee, to be examined under section 5087 of the R. S., is not a “party” to such proceeding, and is therefore not entitled “to take the opinion of the district judge upon any point or matter arising in the course of such proceeding.”
2. SAME, NOT ENTITLED TO COUNSEL.—A witness summoned as aforesaid, not being a “party” to the proceeding, is not entitled to be attended or represented by counsel during his examination.
3. CREDITOR NOT A PARTY TO EXAMINATION.—A creditor of the bankrupt is not a “party” to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel.
4. ASSIGNEE, ATTORNEY AND COUNSEL FOR.—An assignee can only be represented in the written proceedings by his duly appointed attorney; but this does not prevent another attorney from appearing in court, as counsel for the assignee in a particular proceeding therein pending, as provided in section 1000 of the Or. Civ. Code.
5. ATTORNEY, AUTHORITY OF.—An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.

Before DEADY, District Judge.

Certificate from register stating question for the opinion of the judge.

DEADY, J. On the application of the assignee, W. W. Francis was summoned before the register to be examined in the above-entitled matter. Upon the appearance of Francis before the register, he was accompanied by an attorney of this court, who offered and desired to appear as attorney for the witness and also for the bank of British Columbia, a claimant against the estate of Comstock & Co.

Counsel for the assignee objected to the appearance of counsel for the witness or the bank, on the ground that neither the witness nor the bank is a “party” to the proceeding, although it was admitted that the proposed examination of the witness had reference to “an affair of the

bankrupts with the said bank on and about November 14, 1873." The register ruled that the "witness is not entitled to counsel," and that "the bank cannot appear in this proceeding by counsel," and the question: "shall the ruling of the register be sustained?" was certified to the judge for decision. No person is entitled under section 5010 of the R. S., "to take the opinion of the district judge upon any point or matter arising in the course of the proceedings" before the register, unless he is a "party" thereto. The witness Francis is not a party to this proceeding. The only party to it is the assignee. The law gives him the right to examine this witness with reference to the affairs of the bankrupt, so as to enable him to act intelligently in the premises. The witness is no more a "party" to the proceeding than if he was being examined on behalf of the plaintiff or defendant in an ordinary action.

Neither is the bank a party to this proceeding. The examination of the witness is *Ex parte*, and cannot be used as evidence against the bank in any action or proceeding to which it is a party. As has been stated, it is taken solely for the information of the assignee to enable him, as the representative of all the creditors, to understand and assert or defend their rights in the premises. (*In re Fredenberg*, 1 N. B. R. 270; *In re Frienberg et al.*, 2 N. B. R. 426; *In re Fay*, 3 N. B. R. 661; *In re Stuyvesant Bank*, 7 N. B. R. 446.) This being so, the register might properly have refused to certify this question. (*In re Fredenberg*, *supra*.)

Indeed, I think he ought to have refused it, and proceeded at once with the examination of the witness. But for the same reason, that the witness is not a "party" to the proceeding, he is not entitled to counsel. It is only parties who are thus entitled. In this proceeding, whatever interest he may have in the matter sought to be inquired into, if any, Francis is merely a witness, and is no more entitled to appear or be attended by counsel than he would be if called as a witness in an ordinary action.

The same is true of the bank, and for the same reason. It is not a "party" to the proceeding, and the information elicited by it is merely for the benefit of the assignee. If

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the examination disclosed the fact that the knowledge of the witness is or may be material in any controversy with the assignee to which the bank is or may be a party, before such knowledge could be used against the bank, he would have to be called and examined, subject to cross-examination as an ordinary witness in such controversy. The attorney who offered to appear as counsel for the witness and the bank, also objected that the attorney who appeared as counsel for the assignee was not "*the* attorney of the assignee," and therefore not entitled to appear for him upon this proceeding. While I have no doubt that the assignee can only be represented in the written proceedings by his duly appointed attorney, yet I see no reason why another attorney may not appear in court, as counsel for the assignee, in a particular proceeding therein pending, as provided in section 1000 of the Or. Civ. Code. But the attorney seeking to appear for the witness has no standing before the court in this proceeding, and therefore cannot be heard to question the authority of the attorney who appears as counsel for the assignee. For the same reason, the question arising upon such objection ought not to have been certified.

The rulings of the register are affirmed, and the clerk will certify a copy of this decision to him, and is hereby required, under rule 58, to tax the expenses of this certificate, together with a sum of five dollars to be paid to the assignee or his attorney, against the attorney who sought to appear for the witness.

THE ELIZA LADD.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 24, 1875.

1. VESSEL, WHEN MATERIALS BECOME.—The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed.
2. MARITIME CONTRACT.—A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is a maritime one.

Before DEADY, District Judge.

Suit for labor and materials.

John W. Whalley, for libellant.

E. C. Bronaugh, for claimant.

DEADY, J. The amended libel in this case was filed October 18, 1875, and alleges substantially that the *Eliza Ladd* is a domestic vessel, propelled by steam, of the burden of 118.47 tons, and was enrolled at Portland on August 31, 1875, and is employed in navigating the waters of the Wallamet; that she was launched at Portland near Smith's mill, in October, 1874, and on May 28, 1875, she made a voyage in tow of another vessel to the foot of Stark street, and there took on her boilers, engines and machinery, the same having been in the ferryboat *Portland No. 1*, and from thence, on June 1, 1875, made a voyage in like manner to the libellant's works at Albina on said Wallamet river; that on June 1, 1875, the libellant, The Oregon Iron Works, a corporation duly formed under the laws of Oregon, and engaged in business at Albina, was employed by the owner and claimant of said vessel, Joseph Knott, to furnish the material in addition to the boilers, engines and machinery aforesaid, and perform the labor necessary to fit, equip and furnish said vessel for such sum as the same should be reasonably worth; that between said last-mentioned date and August 18, 1875, said libellant performed said contract, and that the reasonable value of the materials and labor furnished by libellant in so doing is \$1,498, in lawful money of the United States, and that no part of said sum, except \$13.84, in old iron, has been paid libellants.

The claimant excepts to the libel, that the contract described therein is not a maritime one, and that this court has no jurisdiction to enforce the supposed lien incident thereto. It is admitted that according to the ruling of the Supreme Court in *People's Ferryboat v. Beers*, 20 How.

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393, and *Roach v. Chapman*, 22 How. 129, a contract to build or construct a ship, is not a maritime one, and therefore not within the admiralty jurisdiction of the United States. This rule is founded upon the assumption that such a contract is one "made on land to be performed on land." On the other hand it is admitted that, by the general maritime law of the civilized world, a contract to build a ship is a maritime contract, because it has relation to a ship as the agent or vehicle of commerce upon a navigable water. (Ben. Ad., Secs. 213, 264.)

Under the law of the cases above cited, it is not always easy to determine what is a maritime contract. In the case in 20 Howard, the contract was for "work done and materials employed in constructing the hull of a new steam ferry boat," while the case in 22 Howard was for furnishing "boilers and engines" to be placed in a steamboat at the time and place of the construction of the hull. It is well established that a contract to furnish work and materials to be employed in making repairs on a vessel is a maritime contract. (*The St. Lawrence*, 1 Black. 522; *Peroux v. Howard*, 7 Pet. 324.) And in such cases, even if the vessel is a domestic one, if the local law gives the material-man a lien, it may be enforced in the admiralty. (*The General Smith*, 4 Whea. 438; *The Lottawana*, 21 Wall. 579.) Now, repairs include all alterations and additions made to a vessel, short of destroying her identity. "A ship is always the same ship, although the original materials of which it was composed may, by successive repairs and alterations, have been in the course of time entirely changed." (Ben. Ad., Sec. 223.)

Suppose the *Eliza Ladd* to have been built and used as a barge, and that afterwards her owner had concluded to use her as a steam ferry or tug boat, and for this purpose should make a contract with A. B. to put the necessary boilers and machinery into her, such an agreement would doubtless be a maritime contract. And yet a contract to build a steam ferry or tug boat outright would not be, under the decisions cited, a maritime contract. My own impression is that any contract made to equip, fit or furnish a vessel

after she is launched and afloat, is a maritime contract. It is not in the language of 20 Howard, *supra*, “a contract made on land to be performed on land,” but one made with reference to a ship already in existence and floating upon the element for which she was originally designed. Such a contract is to be performed on water as much as an ordinary contract of affreightment or repairs. When the contract to build includes the fitting, furnishing, and equipping also, it may be said, that as it is an entirety and not divisible, and the principal feature of it—the building and launching the hull—being non-maritime, it gives character to the whole of it.

When the contract set up in the libel was made, the *Eliza Ladd* had been launched eight months, and for aught that appears was in the same condition she is now, as to her capacity for changing place or carrying freight and passengers, less the machinery necessary to propel her by steam. She was then, it appears to me, a ship, within the definition in Benedict's Ad., section 215: “A locomotive machine adapted to transportation over rivers, seas, and oceans.” She was certainly a machine—an artificial contrivance, and one capable of locomotion or change of place, as is shown by the two short voyages she made before the performance of this contract; nor does it make any difference whether she was “propelled by the wind, the tide or paddles, by steam, by animals, or by the human arm, or towed by another vessel” (Ben. Ad. 217), so that she floated in and moved through the water. Being of one hundred and eighteen tons burden, she was also adapted to the transportation of freight and passengers so far as she had capacity for locomotion. Separate pieces of timber or iron, or both being put together in a certain form, so as to float upon the water and transport or bear up freight or passengers, may become a ship. At what point of time is this change accomplished? I am inclined to think that the correct answer to this question is suggested in the brief for the libellant, and that it is “at the moment when she leaves the ways, and her keel strikes the element for which she was originally designed.” That is the moment of her birth

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as a ship, and the occasion when a name is usually bestowed on her. Thereafter all contracts to equip, furnish or repair this machine have direct reference to a vessel *in esse*, with capacity for locomotion and transportation on navigable waters, and are, therefore, maritime.

Although a contract to build a ship is in fact a maritime one, yet under the rule laid down in 20 and 22 Howard, *supra*, it is to be otherwise regarded in this court. The difficulty is to determine what is included in building a ship—the contract for which, says the court, is not maritime, because it is “made on land to be performed on land.” But, even under that rule, it seems safe to say, that a contract made after a vessel is launched and afloat, to furnish her with a particular means of propulsion, as sails or steam paddles, or to change the mode of her propulsion, is a maritime contract. Certainly it is not a contract to be performed on land; neither is it a contract to build any more than any contract for repairs.

Although this is a domestic vessel, and this work and materials were furnished in her home port, yet the libellant has a lien for the amount of his claim under section 17, p. 656, of the Oregon Code, and the contract being a maritime one, the lien may be enforced in admiralty.

The exception is overruled.

ROBERT W. JONES v. THE OREGON CENTRAL RAILWAY CO.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 30, 1875.

1. DEDIMUS, WHEN GRANTED.—Section 866 of the Revised Statutes gives the courts of the United States power to grant a *dedimus* to take the examination of a witness whenever in their judgment it may be necessary to prevent a failure or delay of justice; and sections 863–4–5 of said Revised Statutes, relating to taking depositions *de bene esse* have no application to the granting or execution of said *dedimus*.
2. SAME, HOW ISSUED AND EXECUTED.—The mode of issuing and executing a *dedimus* granted in pursuance of said section 866 is regulated by

"common usage" or practice, which usage or practice, as to this court, is prescribed by sections 807-8-9 of the Or. Civil Code, relating to taking depositions on commission; and title 7 of chapter 9 of said Code, relating to taking depositions *de bene esse* does not apply.

3. COMMISSIONER TO EXECUTE DEDIMUS.—A person appointed to execute a *dedimus* represents the court and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in section 809 of the Or. Civil Code.
4. CERTIFICATE TO DEPOSITION.—In certifying the deposition to the court it is not necessary for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn.
5. OATH OF WITNESS.—A witness examined under a *dedimus* should be sworn according to the law of the forum whence it issued.
6. SAME SUBJECT.—Section 860 of the Or. Civil Code having provided that an affirmation may be made by any person in place of an oath, a *dedimus* which authorizes the commissioner to administer an oath to a witness, is well executed in this respect when it appears from the return thereto that the witness was duly affirmed.
7. RETURN TO DEDIMUS.—A return to a *dedimus* need not show how a witness was sworn or affirmed, if it states substantially that the witness was duly sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, if they are plainly referred to, and included by the commissioner in certifying the deposition as a part of the proceeding and return.

Before DEADY, District Judge.

Motion to suppress deposition.

Joseph N. Dolph, for the motion.

Walter Thayer and *Benton Killin*, contra.

DEADY, J. The defendant moves to suppress the deposition of Charles S. Hinchman, taken at the instance of the plaintiff herein, for the reason that the witness does not appear, 1. "To have been cautioned, sworn or affirmed according to law; nor, 2. "To have been examined upon the interrogatories attached to the commission;" and that said deposition does not appear, 1. To have been "taken, returned and certified according to law;" nor, 2. "Taken, certified and returned in accordance with chapter 9 of the Code of Oregon and the practice of this court."

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On May 7, 1875, a *dedimus potestatem*, or commission, was issued by the clerk of this court to Samuel L. Taylor, of Philadelphia, giving him power to cause Charles S. Hinchman "to come before" him "at certain days and places to be appointed" by such commissioner, "and then and there" to take the examination of said "Hinchman on his corporal oath as a witness" in the above-entitled cause upon the direct and cross interrogatories thereto annexed; and also "to reduce such examination to writing, and certify and return the same annexed" to such commission "in a sealed envelope directed to the clerk" of this court "with all convenient speed." This commission was issued under section 806 of the Revised Statutes—the same being the final proviso of section 30 of the Judiciary Act of 1789—and sections 807 to 809, inclusive, of the Or. Civil Code.

The examination of the witness was returned to this court in a sealed envelope on October 12, and published by order of the court on November 11. From the return, which is annexed to the commission, it appears that the deposition of the witness was taken in pursuance of the commission at the office of the commissioner in Philadelphia, on the fifteenth and twentieth days of July, 1875, the witness being first "duly affirmed according to law to testify the truth, the whole truth and nothing but the truth." It also appears that the witness, being so affirmed, did depose, in answer to the several interrogatories annexed to the commission, as stated in the deposition. So much appears from the statement of the commissioner preceding and introductory to the answers of the witness to the direct and cross interrogatories. The examination is signed by the witness and then follows a certificate of the commissioner, from which it appears that the witness, pursuant to said commission, came before him "on the days above specified," at 3 P. M. of each day, and "being duly affirmed according to law did testify in the above case as is found above"; and that the deposition was by him reduced to writing and subscribed in his presence. This motion appears to have been made under the apprehension that the provisions of section 30 of the Judiciary Act of 1789, now sections 863-4-5 of the R. S.,

regulating the taking of depositions *de bene esse*, apply to the examination of a witness upon a *dedimus potestatem* as authorized by the proviso to said section 30, now section 866 of the R. S., and that title 7 of chapter 9 of the Or. Civ. Code applies to depositions taken upon a commission as well as to those taken *de bene esse*. But this is a mistake. Neither sections 863-4-5 of the R. S., nor title 7 aforesaid, is in any way applicable to a deposition taken upon a *dedimus* or commission. The argument for so applying title 7 is founded upon the following clause in section 818 of the Or. Civ. Code—"A deposition taken, whether in the State or without, upon insufficient notice or otherwise, not substantially in conformity with the provisions of this chapter, (C. 9) may be excluded from the case, unless," etc.

Title 6 of the same chapter provides for taking the deposition of a witness, out of the State, upon a commission. In such case it is only necessary for the return of the commissioner to show that he administered an oath to the witness and took his examination upon the interrogatories, or if there are none, in respect to the question in dispute. (Sec. 109, Or. Civ. Code.) But title 7 provides for taking depositions *de bene esse* upon notice, and in such case section 815 requires the officer to certify many details as to the taking of the deposition, which are not required by section 809 in the case of depositions taken under a commission. Chapter 9 provides for two modes of taking depositions, the one upon commission and the other upon notice. A deposition taken in either of these modes is taken "in conformity with the provisions of the chapter," when it is taken in conformity with the provisions or title of the chapter relating to the taking of such a deposition.

To hold that all the provisions of the chapter are applicable to a deposition taken under either mode, would not only violate the plain significance of the clause in question, but make the statute an impracticable absurdity. Why go to the trouble of providing for two different modes of taking depositions, and then practically require them to be taken in the same manner in all cases—in effect in only one mode? It is not to be supposed that the legislature would provided

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different modes for taking depositions, in the case of witnesses without or within the State, and then declare that all the provisions applicable to either case should be complied with in the other, and there is nothing in the language of chapter 9 which gives the slightest countenance to such a conclusion. Therefore it is not necessary that the return should show on what days or times the examination of the witness was taken, nor who reduced it to writing. The commissioner is the agent or officer of the court. (*Gilpens v. Consequa*, Pet. C. C., 88.) Power is given him to take the examination, and confidence is reposed in him that he will exercise this power according to the directions of the commission, which is his chart and guide. Neither do the provisions of the R. S., relating to depositions taken *de bene esse*, apply to this deposition. In *Seargent's Lessee v. Biddle*, 4 Whea., 508, the Supreme Court held that depositions taken under a *dedimus* are not to be considered as taken *de bene esse*. To this same effect is the ruling in *Nicholas v. White*, 1 Cr., C. C., 50.

Therefore it is immaterial whether the witness was "cautioned," or not, before being sworn as required by section 864 of the R. S., in the case of depositions taken *de bene esse*. Neither is it material that the return should show anything more than that the witness was duly sworn or examined upon his oath duly administered. Where an oath is required by the commission, if the law declares that an affirmation is equivalent, an affirmation is sufficient. Section 860 of the Oregon Civil Code provides that an affirmation may be made in place of an oath by any person who has conscientious scruples against taking the latter. The commission being an act of this court and the examination of the witness an exercise of judicial power through the intervention of its agent or officer, the commissioner, I think that the law regulating the proceeding in this court—the law of this State—controls the matter of how the witness should be qualified. On the other hand, if it should be held that the law of the place where the commission was executed would control in this respect, it can hardly be

doubted that an affirmation is equivalent to an oath in the Quaker city of Philadelphia.

The objection that the witness was not examined upon the interrogatories, does not appear to be well founded in fact. As has been stated, the return shows that the witness deposed in answer to the first interrogatory as follows, giving the answer, and so on through all the series. This is found in the preamble or introduction to the deposition, and therefore it is contended that it is no part of the certificate to the deposition. Now the code, section 809 *supra*, does not require a certificate to be appended to the examination of the witness, but only that the commissioner shall "certify the deposition to the court." This is sufficiently done when he certifies that the following or the foregoing or accompanying is the examination of the witness given upon his oath or affirmation by me duly administered, in answer to the interrogatories annexed to the commission, or as therein stated. (*Keene v. Meade*, 3 Pet. 1.) In this case the certificate appended to the examination states that the witness "testified in the above case as is found above," that is, in answer to the interrogatories annexed to the commission. Indeed, the matter is too plain to waste words upon. The power to grant a *dedimus* to take the examination of a witness is given to this Court, "in any case where it is necessary, in order to prevent a failure or delay of justice," by section 866 of the R. S. It is to issue "according to common usage," which is construed to be the rule or law governing the practice of the court in this respect at the time. (*Lessee of Rhoades et al. v. Selin et al.*, 4 Wash. C. C., 723.) In this case that law is found in sections 807 to 809 inclusive of the Oregon Civil Code. The mode of issuing the commission and the authority and directions to be contained in it are prescribed by these sections, and it is to be executed accordingly. But the cases in which it may issue are not prescribed by the local law but by the United States statute above cited. When it is necessary to grant a *dedimus* to prevent a failure or delay of justice, the court must determine either by a general rule or a special order in each particular case. It may become necessary to take the examination of a wit-

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ness upon a *dedimus* as well within the State as without, and in such a case it would be done although the local law does not authorize it.

None of the objections made to this deposition are valid. It appears to have been taken in substantial conformity with the directions in the commission, and the motion to suppress it is disallowed.

IN RE THE OREGON BULLETIN PRINTING AND PUBLISHING CO.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 14, 1875.

1. PROCEEDING IN BANKRUPTCY, NATURE OF.—A proceeding to have a debtor adjudged a bankrupt is substantially an action at law, and terminates with the final judgment on the petition or verdict therein; and the subsequent proceedings to ascertain and distribute the estate of the bankrupt are merely consequent upon such action, but no part of it.
2. SAME—REVIEW OF.—Such an action is a *case at law*, and the proceedings therein cannot be reviewed in the Circuit Court until after final judgment therein; and if the case, by the election of the defendant, becomes triable by jury, it cannot be reviewed otherwise than upon a writ of error.
3. STAY OF PROCEEDINGS.—A stay of proceedings in bankruptcy in the District court, is in the discretion of the Circuit Court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below.
4. CASES AND QUESTIONS IN BANKRUPTCY—DIFFERENCE BETWEEN.—*Semble*, that *all* the appellate jurisdiction of the Circuit Courts in bankruptcy is conferred upon them by section 4986 of the R. S., and that section 4980 of said R. S. to section 4984, inclusive, do not confer any such power, but only regulates its exercise; that the terms *cases* and *questions* are used in said section 4986 in contradistinction to one another; that a *case* in bankruptcy, whether at law or equity, is only reviewable in the Circuit Court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction, which the Circuit Courts may exercise upon bill or petition, is confined to the review of the action of the District Courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy.

Before DEADY, District Judge.

Rule to show cause why the proceedings in the District Court should not be stayed pending a petition for review in the Circuit Court.

H. Y. Thompson and W. Lair Hill, for the plaintiff.

Joseph N. Dolph and Joseph Simon, for defendant.

DEADY, J. On September 10, 1875, Blake, Robbins & Co. and others, filed a petition in bankruptcy against the *Oregon Bulletin* Printing and Publishing Co., a corporation duly formed under the laws of Oregon. On September 21, the corporation filed a statement, in writing, denying "That a sufficient number of creditors had signed such petition," and also a denial of the acts of bankruptcy, and a demand for a trial by jury, as well as an answer denying the allegations of the petition.

On September 28, the corporation moved the court to award a *venire facias* to the marshal of the district, returnable before him for the trial of the facts set forth in the petition as provided in section 14 of the act of June 22, 1874, (18 Stat. 182), which motion, after argument, was denied by the District Court.

On November 1, the petitioning creditors moved to strike out the statement in writing aforesaid, denying that a sufficient number of creditors had signed the petition, and also an allegation to the same effect in the answer of the corporation, because the same were irrelevant, which motion, after argument, on November 18, was allowed.

On November 22, the corporation filed a petition in this court, under section 4986 of the R. S. for a review of these two orders, and thereupon, in pursuance of the prayer of the petition, the court made an order requiring the petitioners to appear in this court and answer the petition within four days after the service upon them of a copy of such order, and also then and there to show cause why they should not be restrained from proceeding upon their petition in bankruptcy, pending this proceeding for review.

Upon the day appointed, December 1, the petitioners ap-

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peared and showed cause against a stay of proceedings, and the court took the same under advisement. The superintendence and jurisdiction conferred by section 4986 of the R. S. extends to both *cases* and *questions* arising in the District Court when sitting as a court of bankruptcy, and unless "special provision is otherwise made," it may exercise such jurisdiction by bill or petition of any party aggrieved, and "hear and determine the *case* as in a court of equity." By section 4980 of the R. S., "special provision" is made for exercising this revisory jurisdiction in all "cases in equity" and all "cases at law" by a regular appeal or writ of error.

A proceeding by a creditor to have a debtor adjudged a bankrupt, is a *case* within the ordinary meaning of the term. It is a contest carried on before a court, between parties plaintiff and defendant, according to a form prescribed by law for the purpose of obtaining the judgment of the court upon a matter in controversy between them. (*Osborne v. U. S. Bank*, 9 Whea. 819.) The proceeding is not only a *case*, but, by all analogies, it is a case at law. By it legal rights are to be ascertained and determined in contradistinction to equitable ones, by the intervention of a jury and in a mode otherwise analogous to the course of the common law. (*Parsons v. Bedford*, 3 Pet. 446.) In a proceeding or action to have a debtor declared a bankrupt, the pleadings in the District Court are in no wise substantially different from those in an ordinary action at law, and the questions arising in it are such as usually occur in such an action, As was said by the Supreme Court in *Insurance Co. v. Comstock* (16 Wall. 268), in discussing the nature of this proceeding, "the process, pleadings and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law."

This action or case is commenced by the filing of the petition, and terminates with the judgment of the court that the debtor is or is not a bankrupt. (*In re Comstock*, ante, 128.) If, by the judgment of the court, the debtor is declared a bankrupt, then, as was said in that case, while "the action

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has passed into final judgment," there "may follow long and complicated proceedings in the court concerning the settlement and distribution of the bankrupt's estate, but these are only consequences or incidents of such final judgment." When this judgment is pronounced, the case, so far as the District Court is concerned, is at an end, and may be reviewed by the Circuit Court in the manner prescribed by law. If it has been tried with a jury the case can only be reviewed upon a writ of error, as in other cases at law. This has been expressly decided by the Supreme Court in *Morgan v. Thornhill*, 11 Wall. 19, and in *Insurance Co. v. Comstock*, *supra*, 268. If this case is tried by the court without the intervention of a jury, as it may be with the assent of the defendant, implied from his failure to demand one, still it is a case, and a case at law, but according to a dictum in *Morgan v. Thornhill*, *supra*, 79, it may be reviewed on bill or petition. But if the review in the Circuit Court upon this process is confined to errors of law, the difference between it and a writ of error is only nominal. Ordinarily a case, whether at law or in equity, cannot be reviewed in an appellate court before a final judgment in the lower one. At common law, or in equity, a writ of error or an appeal is only allowed after final judgment in the court below, and this rule is applicable to the exercise of the jurisdiction conferred on the Circuit Courts by section 4986 of the R. S., unless the statute otherwise provides. No such provision has been shown or suggested in regard to the appellate or supervisory jurisdiction over cases mentioned in said section 4986. It is said the jurisdiction is comprehensive, and that it would be "difficult to use language capable of conferring a more complete supervision over all the proceedings of the District Court in bankruptcy." That may all be, and still it does not follow that this supervisory jurisdiction can, or ought to be, invoked to the manifest delay of justice, at every step in the progress of a case or disposition of a question, in the District Court.

This being a case at law, to be tried on the demand of the defendant with a jury, all questions of law which arise in the progress of it and are material to a correct determina-

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tion of it, may be reviewed by the Circuit Court, but only upon a writ of error after final judgment declaring the corporation a bankrupt or not. If the law were otherwise every single ruling of this court in the progress of this case, from the filing of the petition to the final judgment upon it, including the trial of challenges to each juror and the admission or rejection of evidence could be made the ground for a separate petition for review and a stay of proceedings. The bare statement of the proposition seems to carry with it its own refutation. Such a practice would enable the defendant to protract the proceeding beyond the endurance of ordinary mortals, if not their lives, and would amount to a denial of justice. For instance, in the progress of this case, it would be easy to raise a hundred or more separate questions for review. Supposing that a stay of proceedings is allowed in each instance, and supposing each petition for review to be heard at the following term of the Circuit Court, it would take at least thirty-three years, or the time of an average generation, to dispose of the case. But this is not all, for, with a reasonable exercise of ingenuity and perversity, these questions for review could as well be doubled in number as not.

In the construction of the statute of bankruptcy, in my judgment, care should be taken to assimilate the proceedings under it, as much as possible, to known and established modes at law and in equity. All mere arbitrary distinctions in procedure, are but unnecessary hindrances to the speedy and cheap administration of justice, and should be discountenanced and avoided. The appellate jurisdiction of the Circuit Court in bankruptcy is conferred upon it by section 4986 of the R. S. By section 4980 of the R. S. special provision is made that such jurisdiction in cases in equity and at law shall be exercised by an appeal or writ of error. This extends to all cases in equity and at law, and should be construed to include every proceeding under the statute which contains the substantial elements or characteristics of a case as distinguished from a mere question litigated by a summary proceeding or on a motion.

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The residue of this jurisdiction is to be exercised as provided in said section 4986, upon bill or petition, "as in a court of equity." By this means the court reviews the action of the District Court in the disposition of a great variety and number of questions which arise after the judgment upon the petition, in the settlement and distribution of the bankrupt estate. But by analogy to the proceedings in ordinary cases, and in the absence of any provision of the statute directing otherwise, this appellate jurisdiction cannot be invoked before the case or question is finally decided in the lower court. No case has been found where a petition for review has been acted on, before a final judgment upon the petition in bankruptcy; and only two cases have been cited where such petition has been proposed or filed before such judgment. In the one, *Adams v. Boston and Erie Railway Co.*, 4 N. B. R. 322, there was a motion to dismiss the petition upon the ground that the Bankrupt Act did not apply to railway corporations. Why there should have been a motion to dismiss rather than a demurrer to the petition is not stated. Ordinarily, where a defendant denies the jurisdiction of the court before whom he is cited, he does so by a demurrer or plea in abatement to the plaintiff's pleading—by the former, if the want of jurisdiction appears on the face of such pleading, and if not, by the latter. However, the motion to dismiss being denied, it was suggested by counsel that a petition for review might be filed in the Circuit Court, and the question was asked if such filing would operate as a stay. The district judge assuming that the petition might be filed, answered that it would not operate as a stay. It does not appear that any petition was filed, and there is no ground to claim that this case decided the question, whether a petition for the review of the decision on a question arising in the progress of an action in bankruptcy, will lie before final judgment therein. Besides, it does not appear that there was any demand for a jury or defense made in that case; and it might well have been considered, in all that was there said, that judgment would pass against the corporation as a matter of course, after the denial of the motion to dismiss, and that the pro-

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posed petition for review and stay of proceedings would follow rather than precede this judgment.

In the second one, *Sweatt v. Boston, etc. Railway Co.*, 5 N., B. R. 237, it appears, also, there was a motion to dismiss the petition upon the same ground as in *Adams v. Boston and Erie Railway Co.*, *supra*, which being denied, a petition for review was filed in the circuit court, and afterwards withdrawn, whereupon the corporation was by consent adjudged a bankrupt in the District Court. Neither was there any decision of the question under consideration in that case. True, it appears that a petition for review was filed in the Circuit Court, and that no further proceedings were had in the case until the withdrawal of the petition for review, but for aught that appears this was the result of an arrangement or the non-action of counsel. As in the case last cited, there was no demand for a jury or defense made, other than the motion to dismiss, and it might have been thought convenient by counsel to have the question made thereon reviewed at once, as, apparently, that was the only defense to the action. At all events, it does not appear that the matter was in any way ever considered by the court. On the argument, it was urged by counsel for the corporation that it would be a great inconvenience for the defendant, being a corporation, to be compelled to submit to a trial of the action in bankruptcy and thereby expose its private affairs, and therefore it was claimed that there ought to be a review of the orders complained of before final judgment and a stay of proceedings in the meantime, so that if it should be held by the Circuit Court that the District Court had erred in making the same, such inconvenience might be avoided. But this inconvenience, so far as it is one, is imposed upon the defendant in all ordinary actions at law or suits in equity. In such cases, whatever the defense may be, and however much of the private affairs of the defendant may be involved in the litigation, he must submit to a final judgment with or without a trial upon the facts, before he can claim a stay of proceedings or a review of the judgment of the court below in regard to any question in the case. On the score of inconvenience, it is not apparent

why the mode of proceeding in this respect in an action in bankruptcy should be different from that which obtains in ordinary actions. Certainly the affairs of a delinquent debtor are not more sacred or exempt from investigation because it is also alleged that he is bankrupt. Nor is there any reason known or suggested to the court why the affairs of a corporation are of any more importance or entitled to any more privacy than those of an individual. As was said by this court in *Newby v. The Or. Central Railway Co.*, 1 Dedy, 617: "There is no divinity that doth hedge about the affairs of a corporation so as to preclude a judicial investigation of the facts concerning it, whenever and wherever such investigation becomes material to the determination of the rights of third persons."

Under the circumstances, the rulings sought to be reviewed having been made by me in the District Court, and notwithstanding these views of the law, sitting here in the Circuit Court, I have, as stated, assumed that the petition for review would lie in this case and at this stage of the proceedings, so far as to make the order necessary to bring the plaintiffs in bankruptcy into this court, and require them to answer it. So much seemed necessary to be done by me in order to enable the defendant in bankruptcy to get the matter before this court; for as appears by section 4986 of the Revised Statutes, the appellate jurisdiction therein conferred cannot be exercised by either the circuit justice or judge of the circuit, unless he is here in court or it is in vacation. It is not usual to have a vacation in the Circuit Court in this district, nor is it likely that either such justice or judge will sit in this court before the next term thereof, which begins in April next.

But to grant a stay of proceedings is quite another thing. A party is not, in my judgment, entitled to a stay of proceedings of course, because he is entitled to maintain a petition for review. The power to stay proceedings in the District Court, pending a review in this, is a matter in the discretion of the court, and it ought not to be exercised unless it is shown that the plaintiff in the review will otherwise be prejudiced or seriously endangered in his rights.

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In this case, the defendant in bankruptcy cannot be prejudiced in his rights by allowing the action in bankruptcy to proceed to trial and final judgment in the court below. It has denied by its answer, duly verified, all the material allegations of the petition in bankruptcy. So far as it is concerned, it may be presumed that upon the trial it will obtain a verdict and a judgment in bar of the action. In this view of the matter, its rights cannot possibly be prejudiced or endangered. If, on the other hand, the trial should result in a verdict and judgment for the plaintiff in bankruptcy, the defendant will then be entitled to have the whole case reviewed in this court on a writ of error and to a stay of proceedings in the meantime, as a matter of course. Although some of the positions advanced or suggested in the course of this opinion may prove untenable, it seems very plain that at least the action to have the corporation adjudged a bankrupt is a case at law, and that when, by the election of the defendant therein, it became a case for trial by jury, thereafter, the action of the District Court upon any question arising in the progress of it can only be reviewed according to the ordinary mode in actions at law, namely, upon a writ of error from this court after final judgment in the court below; also, that, even admitting that the case in the District Court may be reviewed in this court upon petition after final judgment therein, or upon any question arising in the progress thereof, so soon as the District Court has passed upon the same, still a stay of proceedings, pending such review, is in the discretion of the court, and ought not to be granted where it is not shown or does not appear that the defendant will be prejudiced or seriously endangered in his rights, if the plaintiff is allowed to proceed to final judgment in the court below.

The rule to show cause is discharged and the application for a restraining order denied.

THE STEAMER COSTA RICA.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 13, 1875.

1. NEGLIGENCE—PERIL OF THE SEAS.—Where the master of a steamer attempted to come up the bay of San Francisco in a dense fog, the vessel being in good safety, and the master not being compelled by any exigency to make the attempt, and the vessel was stranded: *Held*, that the master was guilty of negligence, and that the damage to the cargo was not to be attributed to perils of the seas.

Before HOFFMAN, District Judge.

Milton Andros, proctor for libellant.*Delos Lake*, proctor for claimant.

HOFFMAN, J. The libel in this case is brought to recover damages for injuries to goods shipped on the above vessel. The shipments and injuries to the goods are admitted. The defense relied on is injury by "peril of the seas." The circumstances under which the loss occurred are clearly shown by the evidence.

On the afternoon of September 17, 1873, the steamer *Costa Rica*, then on a voyage from Honolulu, arrived off this port. A very dense fog prevailed, and the master cautiously made for the land, giving to the Farallones Islands a wide berth to the north. He continued on this course until he discovered the land about a quarter of a mile distant. He at once stood off shore, and having fallen in with a fishing boat, ascertained that he was ten miles distant from the North Head. At 6.20 o'clock he made Seal Rock, a few ship's lengths distant, on his starboard beam. He then stood to the northward to avoid Mile Rock, which is the chief danger to vessels entering the Heads, and soon afterward passed the mid-channel buoy. He then shaped his course directly up the harbor, proceeding slowly and sounding at short intervals. About seven o'clock he found himself in ten fathoms of water. Knowing from this that he had approached very near to the north shore of the har-

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bor, he altered his course to the eastward, and when he had, as he supposed, reached mid-channel, he resumed his direct course up the harbor. Shortly afterwards he discovered land dead ahead and a few ship's lengths distant. The order to back was at once given, but the engineer reported that the propeller was gone. The ship had not entirely lost her headway, and the master, knowing that if she struck on the rocky bluff ahead of him she might founder in deep water, with great presence of mind ordered her helm to starboard and succeeded in beaching her in the small cove which extends from Point Bonita to Point Diablo. The vessel was subsequently hauled off and repaired, but her cargo sustained considerable damage.

It is not denied that the master was one of the most skillful and experienced commanders of this port. He was on deck during the whole afternoon and evening, personally directing every movement of his vessel. The course he ordered was proper, and should have carried him clear of all danger. He is unable to give any certain explanation of the accident. It is conjecturally accounted for by supposing that some current may have caused the ship to drift from her course, or that her compass may have been affected by some disturbance caused by the vessel (which was of iron) or by local attraction, or that perhaps the helmsman did not keep the vessel on the courses ordered by the master.

With respect to the first two of these hypotheses, it is to be observed that the possibility of danger from those causes was well known to the master, and should have been considered before making his perilous attempt to enter the harbor in a dense fog, when no object was visible by which he could assure himself of his true position. With regard to the last hypothesis, it must be said that it involves a confession of negligence. The master could not himself watch the binnacle and at the same time keep a lookout for the land; but an officer could readily have been detailed for the purpose. Where the safety of the vessel and the lives of all on board depended on the prompt and exact obedience by the helmsman of every order given by the master, it was negli-

gence to have omitted any means of preventing the possibility of a mistake. But if it be claimed that every proper and usual precaution was taken, and that the mistakes of the helmsman could not have been guarded against, then the danger from that cause should have been considered before an operation was attempted the success of which entirely depended on the skill and attention of the helmsman. . . .

The real and only question in the case is: Had the master the right to expose his vessel and the lives of his passengers to the risks which he voluntarily affronted? It is not pretended that there was the slightest necessity for attempting to come up the harbor. The wind was moderate and the sea smooth. Safe anchorage could have been obtained at almost any time after entering the Heads, and especially when the master found himself in ten fathoms of water and knew from that fact that the vessel had deviated from her course. It is not pretended that there was any objection or obstacle to anchoring, especially in the cove where there would have been no danger of a collision with other vessels during the night. It is plain that the master, relying on his skill, or perhaps his fortune, and emboldened by previous impunity, voluntarily exposed his vessel to a danger which common prudence would have refused to encounter.

Several experts have testified that the attempt to come up the harbor was, under the circumstances, an act of the highest imprudence. But no testimony on the point is needed. A moment's consideration of the possible consequences of failure will convince any one of the unjustifiable temerity of the attempt. Had the master not succeeded in stranding his vessel on the beach, another might have been added to the long list of appalling catastrophes at sea, occasioned by the rashness or unskillfulness of commanders of ships.

It may seem unnecessary to cite authorities in support of the principles on which I have decided this case. But they have been so emphatically recognized by the Supreme Court in many cases that a reference to two of them may be appropriate. In the case of the *Portsmouth* (9 Wall., R. 682) it was held that "a captain who in the night and in a

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fog enters a port, supposing it to be his port of destination, enters at his peril of its being so, unless there have been some necessity for his seeking a port. If there was proper ground to doubt whether this port was the one he supposed it to be, and he could safely wait outside until morning, or could signal a tug-boat to pilot him in, he should not proceed until he can see and know what he is doing." It is worthy of remark that in this case the indications by which the master was misled were such as might have deceived a very careful person, and almost sufficient to justify a belief on the master's part that he was running no risk whatever. In the case at bar the hazard of the undertaking was well known and willfully incurred. In the case of *The Mohler* (21 Wall., R. 230) it was decided by the Supreme Court "that when in a high or uncertain state of the wind a vessel is approaching a part of the river in which there are obstructions to the navigation, as *e. g.* the piers of a bridge crossing it, between which piers she cannot, if the wind be high or squally, pass without danger of being driven upon one of them, it is her duty to lie by until the wind has gone down and she can pass in safety."

The rule of law laid down and enforced in these cases by our highest tribunal is commended to us as well by its humanity as by its sound policy. It is that the master of a vessel has no right to expose her, and still less the lives of his passengers, to any unnecessary danger.

Decree for libellants.

THE GUTTA-PERCHA AND RUBBER MANUFACTURING
Co. v. THE GOODYEAR RUBBER Co. ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 16, 1875.

1. INJUNCTION.—PATENT.—On an application for an injunction against the infringement of a patent, the bill should show, either that the validity of the patent has been established in an action at law, or that the right of the complainant under the patent has been recognized and acquiesced in by long unquestioned use and enjoyment, or other equivalent acts.
2. KNOWLEDGE AGAINST OPINION.—Where a motion for an injunction against the infringement of a patent rests upon affidavits of dealers in the article, stating their opinion as to its composition, is opposed by counter-affidavits of the manufacturer of the article, who states the composition from his personal knowledge, other things being equal, the statements of the latter are the more reliable, and the injunction will be denied.

Before SAWYER, Circuit Judge.

The facts sufficiently appear in the opinion.

Stephen H. Phillips, and *M. A. Wheaton*, for complainant.

J. W. Winans, for defendants.

SAWYER, Circuit Judge. I have examined the papers, which are quite voluminous, in this case, and find that the matter upon which the decision is to turn lies in a very small compass.

I do not find it necessary to determine whether there is any conflict between the patents; or the question whether the dead oil of tar is identical with crude carbolic acid. The bill alleges an infringement by selling a certain quantity of a particular hose for the use of the Palace Hotel. The only testimony in the case as to the hose being carbolized hose, made in accordance with the complainant's patent, is the affidavit of Mr. Taylor verifying the bill, and his further affidavit, subsequently filed. What he said upon that point is very brief and not very satisfactory. He simply says that he has been engaged in selling rubber goods for a long time; that he has examined this piece of hose;

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that it is made with pure carbolic acid, as he judges from the appearance of the hose. He does not profess to be a manufacturer, but only a dealer in the manufactured article. On the contrary, Mr. Chevers, who is the treasurer and manager of the New York Belting and Packing Company, states that he is a manufacturer of hose, and is acquainted with the manufacture of this particular hose, which was made by that company, and knows how it was, in fact, made. He states positively that it is made under two patents of Mayall and Robbins, and in the mode prescribed in Robbins' patent; that the substance used in the manufacture was the dead oil of tar, which was applied in the manner described in Robbins' patents. These are the elder patents, and the use of coal tar and dead oil in the manufacture of rubber goods is mentioned in the plaintiff's own patent, as having been previously known. The specifications state that the applicant was aware that coal tar and dead oil had been used for those purposes before. If known before, it could not be covered by complainant's patent, even if not embraced in defendant's. According to the testimony, Mr. Chevers is in a better position than Mr. Taylor to know how this hose was made. He is a manufacturer himself, and as manager of the company he superintended the manufacture of this particular hose, and he knows all about it. He says it was manufactured in the mode prescribed in the Robbins' patent; that the dead oil of tar was used, and applied as therein specified. It meets, then, the allegation made by Mr. Taylor, which can only rest upon opinion, and which is the only testimony upon the point in favor of the complainant. It completely meets and defeats the case made by the bill and affidavit of complainant, and it is not necessary to determine whether dead oil of tar is crude carbolic acid or not, as claimed by defendant and denied by complainant, if the hose was manufactured with that substance; for that substance appears to have been, in fact, used under defendant's patents prior to the issuing of the complainant's patent, or to the invention claimed to have been made by the complainant. It meets the whole case on the application for an injunction. It makes no differ-

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ence whether Mayall's patent covered dead oil of tar or not, if dead oil was in fact used by him or anybody else in the manufacture of hose, prior to complainant's discovery. I would say, also, that the bill does not set out the facts necessary for an injunction. We have to go outside of the bill to the affidavits to determine the long and unquestioned use. There is no allegation that the matter has ever been litigated before, and decided in favor of complainant and no allegation in the bill, that the right of complainant has ever been submitted to, or recognized by, the public. The bill, as an injunction bill, is defective in this particular; but on the other point the testimony of Mr. Chevers is fatal to the injunction. It is more reliable than Taylor's, because he is in a better position than Taylor to know how the hose was made, and what the material used was. It is matter of knowledge with him, and of opinion only with Mr. Taylor, founded upon inspection of the article after its manufacture; and he does not appear to be a manufacturer or chemist. The injunction must therefore be denied, and the restraining order dissolved. Of course, the case may turn out to be entirely different on the trial, but this injunction must stand or fall upon the bill and two affidavits; and the affidavit of Mr. Chevers shows that he is the person having the better means of knowledge.

THE UNITED STATES v. SARAH JANE MONTGOMERY.

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 28, 1875.

1. DIFFERENT COUNTS CHARGE BUT ONE CRIME.—An indictment under section 5479 of the R. S. which charges the defendant with receiving, concealing, and aiding in the concealing, of gold dust stolen from the mails, only changes one crime, and proof of doing either will warrant a verdict of guilty.
2. SEPARATE RECEIVING.—A defendant indicted with another for receiving, concealing, and aiding in the concealing, of stolen property, may be found guilty thereon of a separate receiving, etc, when such other defendant has been discharged therefrom upon a plea of *autrefois acquit*.

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3. RECEIVING, ETC., STOLEN PROPERTY.—What constitutes a guilty receiving, concealing, and aiding in the concealing, of stolen property under section 5479 aforesaid.
4. POSSESSION OF GOODS EXCHANGED FOR STOLEN PROPERTY.—The possession of gold coin received at the mint in exchange for gold dust stolen from the mails, is not a possession of such dust.
5. RECEIVING, ETC., WHERE DONE.—The receiving, etc., of the stolen property must have been done in the district where the indictment is found.
6. PRESUMPTION OF INNOCENCE.—A defendant, however degraded or abandoned, is nevertheless presumed to be innocent of the crime charged in the indictment.
7. WITNESSES.—Circumstances affecting the credibility of.
8. CONFESSIONS.—What weight to be given to.

Before DEADY, District Judge.

Rufus Mallory and Joseph N. Dolph, for the plaintiff.

William H. Effinger, Richard Williams and James D. Fay, for defendant.

DEADY, J., charged the jury as follows: The indictment in this case is founded upon section 5470 of the R. S., which, among other things, provides that any person who shall receive, or conceal, or aid in concealing, any article of value, knowing the same to have been stolen or embezzled from the mail of the United States, shall be punishable by a fine of not more than \$2,000, and by imprisonment at hard labor not more than five years.

The reason and necessity of such a statute is apparent. The post-office is one of the principal departments of the government. Upon the security and celerity with which the mails are carried and delivered throughout the country depend to a great extent the preservation of the business and social relations of the people. Upon the long-established maxim that "A receiver is as bad as a thief," the statute has also provided for the punishment of persons who assist others in stealing or embezzling from the mails by receiving the stolen property, or concealing it, or aiding in concealing it, substantially in the same manner as the thief himself.

By this indictment the defendant is accused in different modes or counts, of receiving, concealing, and aiding in the

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concealing, of three cans of gold dust, of the aggregate value of \$1,830, the same having been stolen from the mails of the United States, to the knowledge of the defendant, in October, 1874, near Canyonville. But these seventeen counts only charge one crime, that of receiving, concealing, and aiding in the concealing, of the stolen dust, under the circumstances stated, and the proof of receiving, concealing, or aiding in concealing, is sufficient to establish the guilt of the defendant. To this indictment the defendant has pleaded not guilty, and the effect of this plea is to put in issue or controvert all the material allegations of the indictment. This being so, the burden of proof is upon the United States, to prove to your satisfaction each of such allegations, before it can ask a verdict of guilty at your hands.

The defendant stands before you as a person charged with the commission of a grave crime, and the fact that she is also a woman and a mother does not change the rules of law or the duties of jurors in such cases. In determining the question of her guilt or innocence, you are not to be swerved by any sympathy for her sex or condition, but you are to say truly whether she is guilty or not as charged, irrespective of such considerations or the consequences to her or others that may follow your verdict. Of course, the fact that the defendant is a woman may be more or less material in judging of her conduct and motives in fleeing the country as she did with Harmison, the party who appears to have stolen this dust and had it in his possession. In considering their relations and intimacy, upon the question of whether this stolen dust was received or concealed by her, or her aid, you may properly consider the fact of the difference in their sex—that they were traveling and cohabiting together as man and wife, with trunks and other traveling gear in common. The indictment charges that the defendant and Harmison both committed this crime, without alleging whether it was done jointly or severally, and counsel for defendant now insists that neither party can be found guilty of a separate receiving under such a charge. Waiving the consideration of that precise question, as not being

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material to the present aspect of the case, the fact being that Harmison has been discharged from this indictment upon his plea of *autrefois convict*, the defendant is now being tried upon it alone, and may be found guilty under it of committing the crime therein charged, separately.

Before the defendant can be found guilty of the charge in the indictment the United States must show that the gold dust in question was stolen or embezzled from its mails. The record of Harmison's conviction in this court of the crime of stealing three similar cans of gold dust from the mails, has been introduced in evidence. This is sufficient evidence of the fact until the contrary appears, it being also shown or proven to your satisfaction that the property mentioned in the two indictments is the same. It must also be shown that the defendant, knowing it to have been so stolen or embezzled, received it from the thief, or concealed, or aided the thief or some one else in concealing it. To constitute a guilty receiving of stolen property by the defendant, it must appear that she voluntarily took it into her control and possession, or voluntarily had it in her possession and control, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner or for his benefit; but it need not appear that she received it with intent to make any gain or profit thereby to herself.

A guilty concealing also implies that the defendant voluntarily secreted this dust, or put it out of the way, or in some manner disposed of it with a like intent as in the case of receiving. To aid in concealing stolen property a party must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. The possession of property by the defendant for which the stolen gold dust was exchanged—as for instance, gold coin for which it may have been exchanged by Harmison at the Philadelphia mint—will not support the charge in the indictment. The possession of such coin would not be the possession of the stolen property, and would not of itself tend to prove the defendant guilty of the

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charge in the indictment. But if the stolen dust was made into coin this circumstance would not change its identity and the possession of such coin would be the possession of the stolen property.

But this cannot be a material question in this case because it is admitted that if this dust was changed into or for coin by Harmison, it was done at the Philadelphia mint. Now the defendant cannot be convicted of the crime charged in the indictment upon proof of receiving, concealing, or aiding in concealing, this dust or the coin into which it may have been changed beyond this district—without the State of Oregon. Evidence has been given to you in regard to the conduct and declarations of Harmison and the defendant beyond this district, during their journey to Texas and back again, but only for the purpose of throwing light upon their acts and conduct while in this district. It being incumbent on the United States to show that this dust was stolen from the mails, instead of introducing the record of Harmison's conviction of the theft, in the first instance, the prosecution saw proper, as it had the right to do, to go into the original proof of the fact. In so doing the acts and declarations of Harmison, both within and without this State, tending to prove that the larceny was committed by him, have been given to you. But you are to remember that this evidence was only received for the purpose of proving the theft of the property, and that the defendant is not to be affected by the acts or declarations of Harmison, only so far as it appears the former were known to her or the latter were made to her, or in her presence and assented to by her.

Although you should find that the defendant knew from Harmison, or otherwise, that this dust had been stolen from the mails, that itself is not sufficient to convict her of the crime charged. And, in this connection, it may be material for you to consider the sex of the defendant for the purpose of determining whether her flight, and subsequent association with Harmison, was as his accomplice in the crime or his paramour. Proof that the defendant fled the country with the thief as his wife is not sufficient to sustain the charge in the indictment. A woman who deserts her husband and flees

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the country with another man who has committed larceny, ought not to complain if a jury finds her guilty of receiving, or aiding in concealing, the property stolen by her paramour, upon circumstances which would be deemed insufficient in the case of an honest woman. But you are not to convict the defendant of the crime charged in the indictment because she appears to have been guilty of the crime of adultery. The defendant's illicit relation with Harmison may have afforded her favorable opportunities, and offered strong temptations, to assist him in concealing the fruits of his crime, but it is not sufficient of itself to establish the fact that she did so assist him. But whatever her conduct or condition, the law presumes that the defendant is innocent of the crime charged against her until the contrary is proven beyond a reasonable doubt. In this respect, and so far as the crime charged in the indictment is concerned, she stands before the law as the peer of any woman, however virtuous or honorable. This presumption of innocence is the shield which the law interposes between her and her accusers, and it cannot be thrust aside or beaten down except by the force of evidence which shall satisfy your minds, beyond a reasonable doubt, of her guilt.

A reasonable doubt is a substantial one—not a mere whim, caprice or speculation. It arises out of the case, from some defect or insufficiency in the evidence which makes a juror hesitate and feel that he is not satisfied. Mathematical certainty is not attainable in criminal trials. If you are morally certain of the defendant's guilt you should say so by your verdict, but unless you are, however you may suspect it, you must say not guilty. You are the judges of the credibility of the witnesses and the weight to be given to their testimony.

The evidence of Cardwell tending to show that the defendant attempted to suborn him to swear falsely on the trial of Harmison was admitted without objection, but it is my duty to say to you that it is not relevant or competent proof of the crime charged in this indictment. It may tend to show that the defendant was willing to run any risk, or even commit a crime, to save her paramour from conviction

and punishment, but it does not prove that she committed the crime for which she is on trial. Montgomery, the late husband of the defendant, is contradicted by several witnesses and by the reporter's notes of his testimony on Harmison's trial. Besides, it appears from his own evidence that he knew of the theft soon after it was committed, in October, 1874, and had had the gold dust in his buggy and in his house without disclosing the fact. Besides, Cardwell, a witness called by the prosecution, testifies that Montgomery saw him at Canyonville, about the time the warrants were sworn out for Harmison and the defendant, and urged upon him the necessity of their—that is, Montgomery and Cardwell making up a good story about the robbery, and sending Harmison and the defendant “up.” Upon this trial he testified that when Harmison left this dust for him at the tollhouse the defendant said he was foolish not to take it, when he spoke of their little child, and said it would ruin them. Upon cross-examination he stated that he testified to this conversation on Harmison's trial, but it appears from the reporter's notes that he did not. The witness was the husband of the defendant, and she deserted him for Harmison. He may entertain unkind feelings towards her on this account, and he may desire, as he said to Cardwell, according to the latter's testimony, to “send her up.” All these circumstances go to affect the credibility of this witness. What weight shall be given to his testimony you must judge, always remembering that a witness who is intentionally false in a material part of his testimony ought to be at least distrusted, as to the rest of it.

The postal agent, Mr. Underwood, who acted as deputy marshal in pursuing and arresting Harmison and the defendant at Seguin, Texas, and bringing them here for trial, testifies to conversations and confessions of the defendant all along the route from there here. This kind of testimony should be received with caution. The witness testified in a very indefinite manner as to the time and place of these conversations—giving them apparently in his own language and not always in the same words. After being on the stand one afternoon, and apparently going over the whole

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subject, he came back the next morning and testified to important conversations with the defendant in Texas, and between there and St. Louis, which he had not stated the day before, or apparently remembered. Besides, in stating a material part of a particular conversation, he first said she used the word "they," and afterwards said she used "we"—a change which makes a material difference in the sense and effect of the admission. I make these suggestions not by way of calling in question or casting doubts upon the integrity of the witness, but that his testimony may be received with due caution. Apparently this prosecution was set on foot by him, and he has since been earnestly engaged in the arrest of Harmison and the defendant and the pursuit of evidence to secure their conviction, and he is liable to be unconsciously influenced by his zeal in the premises and the very natural desire of success in what he has undertaken.

Upon the subject of verbal confessions, I read to you as a part of my charge, from 1 Green. Ev., sections 214-215 as follows: "The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected, that the mind of the prisoner himself is oppressed by the calamity of the situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in the pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence; and sometimes lead to its rejection, when, in civil actions, it would have been received. The weighty observation of Mr. Justice Foster is also to be kept in mind, that this evidence is not, in the ordinary course of things,

to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted.

Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence, as among proofs of guilt. The only direct evidence in the case which brings this defendant into what might be considered possession of this dust, in Oregon, is that of Montgomery, concerning the dust being left at the toll-house, near Canyonville, where he and she lived in the spring of 1875. According to his account, he came home one day, and found his wife, the defendant, lying on the lounge in the front room, when she laughed and said: "Dan Smith (Harmison) has been here and left you a present." He asked what it was, and she replied by rising up and leading him into the back room, and pointing him to a sack in the potato-box. He put his hand into the sack, felt the cans of dust, and drew one of them in sight, when he said: "It is that d—d infernal dust! Give it back to him, and have nothing to do with it." The defendant urged him to keep the dust; but he declined, saying it would be the ruin of them, when she promised to return it, and Montgomery never saw it afterwards. Upon this evidence, assuming it to be true, I do not think, as a matter of law, that the defendant was then and there guilty of the crime charged in the indictment. A package is brought to the house and left with her for her husband, which she delivered to him, and he refuses to accept it, and directs her to return it to the person who brought it, which she does. This alone does not make her guilty of receiving, concealing, or aiding in the concealing, of stolen property, even if

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we assume, as is probable, that she knew these cans of dust had been stolen from the mails. And although it was wrong to advise her husband to take it (if she did), yet she did not hereby commit the crime with which she is charged.

Gentlemen of the jury: the case is now submitted to you to say upon your oaths, under the law and evidence given you in court, whether the defendant is guilty or not. Take the law so given you and apply it to the facts, as you may find them from the evidence, and make up your verdict accordingly.

The jury, after an absence of half an hour, returned into court and gave a verdict of "Not guilty," and the defendant was discharged.

MILO HOADLEY v. THE CITY AND COUNTY OF SAN FRANCISCO.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 27, 1875.

1. REMOVAL OF SUITS FROM STATE TO NATIONAL COURTS.—A suit was pending in the Supreme Court of California on appeal from the judgment of the District Court at the date of the passage of the act of Congress of March 3, 1875, relating to the jurisdiction of the United States Circuit Court, in which the judgment was reversed and the cause subsequently remanded to the District Court for new trial. At the first term of the District Court at which a trial could be had after the filing of the remittitur and before any other trial, the suit was removed to the United States Circuit Court on application of the plaintiff: *Held*, That the case is within the provisions of sections 2 and 3 of said act of Congress, and that it was properly removed.

Before SAWYER, Circuit Judge.

Motion to remand the case to the State Court from which it had been transferred to the United States Circuit Court.

The facts appear in the opinion of the Court.

W. C. Burnett, for the motion.

S. W. Holliday, contra.

SAWYER, Circuit Judge. This action was originally commenced in the District Court of the State of California for the Twelfth Judicial District on January 5, 1870. A trial was had and a judgment entered therein July 3, 1871. An appeal having been taken to the Supreme Court of the State, October 25, 1871, the judgment was reversed and a new trial ordered by that tribunal, February 3, 1875, and a petition for rehearing having been subsequently filed and denied, a remittitur issued in pursuance of the judgment of reversal, July 29, 1875, which was filed in the District Court, September 20, 1875.

On November 15, 1875, which was before the term at which the case could be first tried in the State District Court, the only court in which it could be tried, after it had been remitted to that court by the Supreme Court, the plaintiff presented a petition to the said District Court, in due form, praying a removal of the case to this court, and it was accordingly removed. The defendant now moves to remand the case to the State Court, on the ground that its removal was not authorized for the reason that it had already been tried in the State Court before, and was pending in the Supreme Court on appeal at the time of the passage of the act of Congress of March 3, 1875, under which the removal was had. It is not denied that the subject-matter of the suit is such as in that particular would authorize a removal.

Section 2, as to the point in question, provides that "any suit of a civil nature, at law or in equity, now pending, or hereafter brought in any State Court," etc., may be removed. And section 3, that whenever any party entitled to remove a suit shall desire to do so, he "may make and file a petition in such suit in such State Court before or at the term at which said cause could be first tried, and before the trial thereof for removal," etc. Thus it will be seen that the statute, in express terms, authorizes the removal of a suit pending in any State Court at the time of the passage of the act, "now pending," as well as those that should be afterwards brought. But section 3 limits the time within which a removal may be had. It requires the election in either

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case to be promptly made. It requires the party to avail himself of the opportunity to remove at, or before, the first term at which a trial could be had, and before any trial after the right to remove attaches. This case was pending in a State Court on appeal at the date of the passage of the act. The judgment of the court below had been reversed, and a new trial ordered, but there was pending a petition for rehearing. It was liable to be tried again, this liability depending upon the decision of the Supreme Court upon the petition for rehearing. All proceedings in the case in the District Court were suspended pending the appeal; and it could not be tried in the District Court till remitted from the Supreme Court. Upon the final reversal of the judgment with directions to try the case again, it stood in all particulars as though it had never been tried. The case not having been finally disposed of, but being liable to be tried again at the date of the passage of the act of Congress, it was, in my judgment, a suit pending in a State Court within the meaning of section 2, to which a right of removal attached; and the clause "the term at which said cause could be first tried and before the trial thereof," means "first trial," and "before the trial thereof" after the right of removal attached; and that is necessarily after the passage of the act giving the right of removal. In this case there was no trial, and no term when the cause could have been tried after the passage of the act, and after the right to remove attached, before the application for removal was actually made and granted. Mr. District Judge Swing of the Southern District of Ohio, held a removal to have been properly made in a cause pending in the State Court at the date of the passage of the act of Congress in which there had, prior to that date, been two trials and verdicts, both of which had been set aside, and where the cause stood awaiting a third trial at the date of the passage of the act. (*Andrew's Executors v. Garrett*, 2 Cent. Law Jour. 797.)

I fully concur in the views expressed by the learned judge. The only difference between that case and this, is, that the present case was pending in the Supreme Court on a petition for rehearing after a judgment of reversal, and no trial

could be had, or movement for removal made, until the petition for rehearing should be decided and the case remitted to the District Court in which alone the new trial could be had. I do not think this circumstance affects the right of removal. It was a cause "now pending" within the meaning of the act to which a right of removal attached, and the removal was made at the first opportunity. The motion to remand must be denied, and it was so ordered.

THE UNITED STATES v. ANDREW J. HARMISON.

DISTRICT COURT, DISTRICT OF OREGON.

JANUARY 3, 1876.

1. AUTREFOIS CONVICT.—A plea of *autrefois convict* to an indictment charging the defendant with knowingly receiving gold dust stolen from the mails is sustained by evidence of a previous conviction of the crime of stealing the same dust from the mails upon the ground that the thief could not receive stolen goods from himself, and that his receipt and possession of the property, as such, was an integral part of the crime of larceny, of which he was already convicted.
2. JUDGMENT.—A court has power to set aside or modify its judgments, in both civil and criminal cases, during the term at which they were given.
3. CRIMES.—The Legislature may carve out of a single transaction several crimes, but where a party is convicted of two crimes carved out of substantially one transaction, that fact ought to be considered in fixing the measure of his punishment.

Before DEADY, District Judge.

Motion to have the defendant's sentence reconsidered, and the measure of punishment readjusted.

William H. Effinger and *James D. Fay*, for the motion.

Rufus Mallory, contra.

DEADY, J. Late in the evening of Tuesday, December 21, the defendant was found guilty of embezzling a mail pouch from the United States mail on the stage between Roseburg and Levins' station, in Southern Oregon,

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and stealing three cans of gold dust therefrom. On the next morning the case of the United States against this defendant and Sarah J. Montgomery, for receiving the same dust, knowing it to have been so stolen, was called for trial. The defendant then asked leave to withdraw his plea of not guilty to the second indictment and plead *autrefois convict* thereto. Leave was granted, and after argument the plea was held good, upon the ground that the thief could not receive stolen goods from himself, and that his receipt and possession of the property as such, was an integral part of the crime of larceny, of which he had been already convicted. But to enable the defendant to maintain this plea of *autrefois convict*, and thereby avoid a second trial for a part of the same offense, he was first compelled to ask the court to pass sentence and give judgment of conviction in his case without further inquiry into the circumstances of it. Accordingly the court sentenced him to eight years' imprisonment in the penitentiary, and ordered the execution of the sentence to be stayed until the further order of the court.

It is the settled practice of this court where a discretion is given it, as to the extent of the punishment to be imposed upon a party, to hear evidence of any circumstances which may properly be taken into view, either in mitigation or aggravation of such punishment. A similar mode of proceeding is prescribed for the State courts in like cases in sections 204-207 of the Oregon Criminal Code. The term at which this judgment was given, not having yet passed, the power of the court to set it aside or modify it, is undoubted. The Supreme Court in *Ex parte Lange*, 18 Wall. 167, announce the general rule upon the subject in these words: "The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they were first made, is undeniable."

On Thursday, and immediately after the trial of the indictment against Sarah J. Montgomery had resulted in a verdict of "Not guilty," the defendant made this application, and it appearing from the facts in the case that the defend-

ant, by no fault of his own, had been deprived of the opportunity to offer evidence of circumstances in mitigation of his punishment, it was granted. On the reconsideration of the motion to fix the punishment, the defendant was examined as a witness on his own behalf, and cross-examined by counsel for the United States.

[Here the court stated the testimony of the defendant, and considered its probability.]

On the whole, and for the purposes of the question before the court, I am constrained to regard the defendant, however guilty, as neither the sole nor principal party in the transaction. Still, upon his own admission and in contemplation of law, he is guilty of embezzling the pouch and stealing the dust therefrom. What he assisted another to do, he is technically guilty of doing himself.

When sentence was pronounced upon the defendant for four years' imprisonment for each offense, the court had no time or opportunity to examine into the matter, and supposing he would not be called for sentence until after the trial of the indictment for receiving the dust, and probably not until after the disposition of a motion for a new trial, I had not given the matter any particular consideration.

Section 5467 of the revised statutes, upon which this indictment is found, is far from being as clear and distinct as it should be. But I think it probable, and so charged the jury, that the Legislature intended to make the act of taking a sack from the mail and abstracting its contents, two separate and distinct offenses, although, as in this case, done by the same person and at the same time. There is no doubt but that the Legislature may carve out of a single transaction several crimes, and this seems to be the effect of the statute in this case. Yet, it is certain, that morally speaking, there was but one crime committed—one criminal transaction—in taking this pouch and appropriating its contents, and as the law has carved two offenses out of it, for both of which the defendant has been found guilty, the court, in fixing the measure of his punishment, ought to take that fact into consideration. Therefore, in consideration of the premises, the defendant is sentenced for the

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crime of embezzling the mail sack intrusted to his care, to five years' imprisonment at hard labor, this being the maximum punishment provided for the offense; and for the crime of taking the gold dust from the sack already so embezzled he is sentenced to one year's imprisonment at hard labor, that being the minimum punishment provided for the offense, and it is also ordered that this judgment be executed in the penitentiary of this State.

THE SHIP ERICSON.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 10, 1876.

1. DESERTION BY SEAMAN.—When a seaman, against the orders of the master and knowing that the ship was about to sail, went ashore and failed to return to the ship, and subsequently, when apprehended by the master, broke away from his custody, and it appeared that further delay would have imperilled the ship: *Held*, that this conduct amounted to a desertion, and that the wages due the seaman were forfeited.
2. ALITER.—Where he has gone ashore by permission and without knowing that the ship was about to sail, and his failure to rejoin her is caused by drunkenness, but without any intention on his part to desert, but a qualified forfeiture will in such case be imposed.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, proctor for libellants.

Charles Page, proctor for claimants.

HOFFMAN, J. The evidence shows that the libellant McKenzie, against the orders of the master and with the knowledge that the ship was about to sail, persisted in going on shore "to take a drink," as he said. Circumstances which will be detailed hereafter rendered the immediate departure of the vessel indispensably necessary. The captain deemed it so important to get over the bar that he abandoned about twelve tons of freight which he would otherwise have taken on board. As many of the men were missing, the remaining crew objected to going to sea short-handed.

The captain, however, persuaded them to work the ship over the bar by the promise that he would either recover the deserters or procure substitutes. He accordingly left the ship in charge of the pilot and mate, and went into the town (Newcastle, N. S. W.), to endeavor to find the missing men. He found the libellant, with some others, at a dram-shop and directed them to remain where they were while he went to look after the other men. On his return with the men he had shipped, he found the libellant and proceeded with him and the rest towards his boat. They had approached within a short distance of the boat when the libellant broke away and ran. The captain and two men pursued him. They were unable to overtake him. When he found they had abandoned the pursuit he, as the captain states, "turned round and abused him fearfully."

The captain had no alternative but to go to sea without the libellant, notwithstanding that he was the carpenter, whose services might be of great importance. It was night-fall; the ship was on a lee shore; the barometer was low; storm signals were set, and the harbor-master had warned him of the approach of an easterly gale. Had he continued the pursuit of the carpenter he might have lost the men whom he had just recovered or shipped.

The ship, therefore, set sail without the libellant. He now sues to recover wages, not only for the time of his service actually performed, but for the whole voyage up to the arrival of the ship at this port. This last claim is wholly inadmissible; and it was not insisted on at the hearing.

The only question is, whether the abandonment of the service by the libellant constituted a desertion to which the statute attaches the penalty "of forfeiture of all or any part of the wages he had then earned." In the case of *Scully v. The Great Republic*, 1 Sawyer, 31, a somewhat similar case was considered by this court. The libellant, in that case, had gone ashore by permission. By some accident not clearly explained, but probably owing to indulgence in liquor, he did not return to the landing until after the ship sailed from Yokohama for Hongkong. On her return to Yokohama, he claimed to be reinstated, which the

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captain refused. He sued for wages for the whole voyage, and his expenses at Yokohama from the time he offered his services to the master. He was allowed wages up to the time of his leaving the vessel.

The court held that there was no reason to believe that he intended to finally abandon the service. But the circumstances of this case are clearly distinguishable from those of the case at bar. In Scully's case, the absence, though culpable, was the result of accident; or, if that term be inapplicable to a neglect caused by drunkenness, the facts negatived the idea of any intention to desert. But in the case at bar, the libellant went on shore without permission and against the express command of the master, who informed him that the ship was to sail at eleven o'clock. He did not, like Scully, merely arrive at the landing too late to rejoin the ship; but when the master, who was at pains to recover him, was taking him to the boat, he broke away and ran. He himself admits having done so. The natural and inevitable consequence of this was to compel the master to proceed to sea without him. He must be held to have intended what was the necessary result of his conduct. He cannot, by alleging drunkenness, or rather forgetfulness of all that occurred except his starting back, escape the consequences of his own acts. He does not, in his testimony, explicitly say that he was drunk; and the fact that he was able to outrun his pursuers would seem to indicate that he was only partially intoxicated. His running away was, under the circumstances, an act of desertion, and must have been so intended by him. Whether that intention was formed while under the influence of liquor, I consider immaterial.

In the case of the libellant Weston, the evidence is very meagre, but I think it hardly sufficient to show a desertion. He left the ship about seven o'clock by permission of the master, as he says. He got drunk and remembers nothing until the next morning. The captain denies that he gave permission to the man to go ashore; but it does not appear that he knew that the ship was to sail, or that he commenced his debauch with the knowledge that, if he did not

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rejoin the ship during the morning, he would certainly be left. His case seems nearly identical with that of Scully. If the decision in that case was correct, Weston is entitled to his wages, subject to such qualified forfeiture as this court may, by section 4596 revised statutes, impose. In cases of absences without leave, not amounting to desertion, the offender may be punished by imprisonment for not more than one month, "and also, at the discretion of the court, by forfeiture of his wages of not more than two days' pay, and for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses which have properly incurred in hiring a substitute." The amount of the forfeiture, if any, which is to be imposed thus seems, within the limits prescribed, to be left to the discretion of the court. If Weston had known that the ship was about to sail, I should be inclined to inflict the extreme statutory penalty. But this is not shown. I shall impose a forfeiture of such a sum for each twenty-four hours of absence as will amount to twenty days' pay.

Decree accordingly. The libel of McKenzie is dismissed.

These suits, though separately brought, were tried together. I have, therefore, considered them both in one opinion.

STINER HALVERSON v. E. P. NISEN ET AL.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 16, 1876.

1. INJURIES BY NEGLIGENCE OF A FELLOW-SERVANT.—The owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate, where no personal negligence on the part of the owner appears.

Before HOFFMAN, District Judge.

J. McHenry, J. P. Dameron and A. H. Townshend, for libellant.

Milton Andros, for respondent.

HOFFMAN, J. This action is brought to recover compensation for injuries sustained by the libellant, a seaman on

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the schooner *Twilight*, by reason of the giving way of a rope to which a triangle on which the libellant was working, was attached. The libellant fell to the deck and sustained grave injuries. The respondents are the owners of the schooner. The rope which gave way was the jib down-haul, and the accident was caused by the chafed condition of the seizing, by which the down-haul block should have been secured. The triangle was rigged by the mate, and it is to his negligence or unskillfulness that the accident is to be attributed. No evidence whatever has been offered to show actual negligence on the part of the respondents. It is not pretended that they failed to exercise due care in the selection of the mate, or that there was any carelessness or neglect in the original outfit and appointments of the vessel. It is contended that in the owner's contract with the seaman there is an implied warranty that the vessel shall be, and continue during the voyage, seaworthy in every respect, and that the owner is responsible for any damage that may happen to the seamen through any defect in the tackle, apparel, or furniture of the ship. I do not consider it necessary to examine at much length the soundness of this proposition, for the circumstances of this case do not admit of its application if its soundness were conceded. In a certain sense it is as much a part of the implied engagement of the owner with the mariner that the ship shall, at the commencement of the voyage, be furnished with all the customary requisites for navigation, or, as the term is, shall be seaworthy; as that the master shall supply the mariners with good and sufficient provisions. (*Dixon v. The Cyrus*, 2 Pet. Admr. 411; *Curtis, R. & D.* 20.)

If, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from that of any other master to a servant in his employment. It is the master's duty in all cases to use ordinary care and diligence to provide sound and safe materials for his servants. But he does not warrant them to be so nor insure the servant against the consequences of their defects. The foundation of his liability is his personal

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negligence. If the master knows, or would have known if he had used ordinary care, that the buildings or materials which he provides for the use of his servants are unsafe, he is certainly answerable for injuries caused thereby to his servants. (See Shearman and Redf. on Neg., Sec. 92, and cases cited.)

So, also, it is the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate, though he is not bound to guarantee them against such risks. (Id. Sec. 93, and cases cited.) In *Couch v. Steel*, 3 El. & Bl., 402, these general doctrines were applied to the case of a seaman suing for injuries caused by the unseaworthiness of the vessel. The court held the declaration insufficient because it failed to allege that the owner knew of the unseaworthiness, or to impute any personal blame to him. It may perhaps, be doubted whether the allegation that "the owner so negligently, improperly and insufficiently equipped and fitted said ship, that she was unseaworthy and unfit for the voyage," was not a sufficient averment of actual negligence or want of due care on his part.

In the case at bar there is, as before remarked, no evidence of any negligence whatever on the part of the owner. The vessel was not unseaworthy even at the moment of the accident. By natural wear and tear the fastenings of a block had become chafed and gave way. They should undoubtedly have been examined before using them under circumstances where their insufficiency might produce serious or fatal injuries. But the negligence was that of the mate who rigged the purchase—it was in no respect that of the owner. The case, therefore, turns upon the question whether the owner, as the common employer of both, is liable to one servant for the negligence of his fellow-servant.

In *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. R. 564, Allen, J., delivering the opinion of the court observes: "Certain principles touching the liability of the master to the servant for injuries sustained by the latter in the course of his employment have, by decisions in this State and several of the sister States, as well as in England, become so well

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settled that they need only to be stated. They cannot be disturbed, neither can their authority be disregarded. 1. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. 2. The rule exempting the master is the same although the grades of the servants or employees are different; and the person injured is inferior in rank and subject to the directions and general control of him by whose act the injury is caused." For these propositions the learned judge cites a long list of authorities.

The learned authors of the work on negligence already cited state the law as follows: "A master is not liable to his servant for the negligence of a fellow-servant, while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault, or in retaining him after notice of his incompetency. The master does not warrant the competency of any of his servants to the others. Whether rightly or wrongly decided as a matter of principle, it is at least certain that this is the settled law of England, Ireland and America.

"A fellow-servant, within the meaning of this rule, is generally held to be one serving the same master and under his control, whether equal, superior or inferior to the injured person in his grade or standing. * * * *
The fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference." (Shearman & Redf. on Neg. Sec. 86.)

The learned authors sustain these positions by copious citations of authority. It may be added that in a case nearly identical with the case at bar the question was decided by the Circuit Court for this district in accordance with the rules above stated, though not without the same misgivings as to its soundness in principle, at which the authors of the treatise on negligence hint in the passage first above cited. Under the law as settled by the authorities I am compelled to decide that the libellant has no cause of action against these respondents.

UNITED STATES v. E. D. KELLY.

CIRCUIT COURT, DISTRICT OF NEVADA.

MARCH 22, 1876.

1. MAILING QUACK MEDICAL ADVERTISEMENT.—Knowingly depositing in the United States mail by the publisher, a newspaper, containing a quack medical advertisement giving information, how and where, articles for the production of abortion and prevention of conception could be obtained: *Held*, to be a violation of section 3893 of the Revised Statutes of the United States.
2. IDEM.—Such advertisement as published in the defendant's paper, and set out in the statement of the case: *Held*, to give information how, where, and of whom, articles designed to produce abortion, and for the prevention of conception could be procured.
3. INDICTMENT UNDER SECTION 3893 R. S.—It is not necessary that the advertisement should indicate, or the indictment allege, any particular article or thing or its properties.
4. IDEM.—The statute forbids the use of the mails for carrying any advertisement giving information where articles designed for producing abortions and the prevention of conception can be obtained or made; the indictment charged in the conjunctive "obtained and made," and it was held good, and that proof of either would be sufficient.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

The defendant, the publisher of a newspaper, was indicted under section 3893 of the United States Revised Statutes, for knowingly mailing a newspaper containing an advertisement giving information where, how, and of whom, articles and things designed for the procuring of abortion and the prevention of conception could be obtained and made. The advertisement was set out in the indictment. It purports to be that of one Doctor W. K. Dougherty. It gives his name; the location and number of his office, and then says: "Established especially to afford the afflicted sound and scientific medical aid in the treatment and cure of all private and chronic diseases, cases of secrecy, and all sexual disorders." After enumerating a number of sexual diseases, he says that "all parties consulting him by letter or otherwise, will receive the best and gentlest treatment and implicit secrecy." Under the heading "To Females," he says: "When a female is in trouble, or afflicted with any

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of the diseases peculiar to her sex, she should go or write at once to the celebrated female doctor, W. K. Dougherty, at his medical institute, and consult him about *her trouble* and diseases. All *married* ladies, whose delicate health or *other circumstances* prevent an increase in their families, should write or call at W. K. Dougherty's medical institute, and they will receive every possible relief and help. The doctor's offices, consisting of a suite of six rooms, are so arranged that he can be consulted without fear of observation. To correspondents, patients (male or female) residing in any part of the State, however distant, who may desire the advice and opinion of Doctor Dougherty in their respective cases, and who think proper to submit a written statement of such in preference to holding a personal interview, are respectfully assured that their communications will be held most sacred and confidential. If the case be fully and candidly described, personal communication will be unnecessary, as instructions for diet, regimen, and the general treatment of the case (*including the remedies*), will be forwarded without delay, and in such manner as to convey no idea of the purport of the letter or parcel so transmitted."

The defendant demurred to the indictment upon the ground that this advertisement did not contain any of the forbidden matters, and upon other grounds stated in the opinion.

Charles S. Varian, United States Attorney.

Robert M. Clarke, for the defendant.

By the Court, SAWYER, Circuit Judge. We think, upon examination, that there can be no doubt as to what anybody would understand from this advertisement. In it the doctor has particularly included and pointed out all diseases, private and otherwise, and then he refers to "*other troubles*." He refers to any occasion why an increase of family should not be desired. It is true he has not used the word "prevent." He has been very cautious; but what, evidently, is the meaning intended to be conveyed? He does not use language so direct as

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he might possibly have done, but if the advertisement gives the forbidden information indirectly, it is as much within the prohibition of the law as if it were given in direct terms. It appears to us that the information prohibited by law is undoubtedly furnished. No one who desired to find a party with whom to confer as to these remedies, or from whom to receive advice with regard to procuring abortion or the prevention of conception, would have any difficulty in understanding that this party, W. K. Dougherty, had given notice that he could and would give that advice, and furnish those remedies. The language of this advertisement must be understood as its author intended it should be. Chief Justice Shaw thus states the doctrine of intent: "It is a general rule of construction in actions of slander, indictments for libel, and other analogous cases, where an offense can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used." (*Commonwealth v. Kneeland*, 20 Pick. 206; 1 Bish. Cr. Law, Sec. 914.)

"In like manner the form of the libel is immaterial; for if the language is ironical, or is otherwise so framed as not to convey directly the idea meant, yet, if it is adapted to accomplish the evil purpose it is sufficient." (Id. Sec. 915.) Hawkins adds, "that a defamatory writing expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is un-

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derstood by every, the meanest, capacity, cannot possibly be understood by a judge and jury." (Id.) It seems to us that this language is particularly applicable to this case. Is it possible to doubt that the language of this advertisement is so framed as to convey, if not directly the idea meant, at least indirectly, or that it accomplishes the evil purposes sought to be avoided by the statute? Is it possible for anybody to read this advertisement and not understand that he can find medicine, advice, and treatment at the place mentioned, for the purposes which are by the statute forbidden? We think that no private party in search of such remedies, and no judge or juror would be at a loss to understand the meaning of this advertisement, however cautiously worded to escape the penalty of the law. Indeed, we think the information prohibited by statute is directly conveyed. •

It was further said, in objection to this indictment, that some particular article or thing should be specifically described in the advertisement mailed, and that none is so described. We do not think it necessary that any particular article, or its specific properties, should be indicated in the advertisement. W. K. Dougherty advertises that he will not only give advice, but furnish the remedies to accomplish the forbidden purposes. He does not point out the remedies specifically, and state what they are; and it is not necessary that he should do so. It is sufficient if he advertises that the remedies can be furnished by him, and where and under what circumstances they can be obtained. We think the language used is sufficiently specific to sustain the indictment. This law was not passed without an occasion for it. Usually statutes are not passed to meet an emergency until an emergency arises, or is anticipated in some way. It is not to be expected that a quack doctor will advertise in plain express terms, that he will furnish the means for the prevention of conception, or to procure abortion. Such an advertisement probably never has been, and never will be, published. It is doubtful if any one more specific than this has ever been published. Undoubtedly advertisements of this character have been published for many years, extensively; and to meet this

class of cases, among others, the statute was passed. If this advertisement does not fall within the purview of the statute, it may well be regarded as a useless enactment. It will certainly fail to accomplish the purposes intended.

This indictment charges the defendant with mailing a paper which gave information where the remedies or article or thing could be "obtained and made." It is claimed that it is insufficient on that ground, whatever the proof may be: We do not think it necessary to prove the conjunctive. Two cases were cited by defendant's counsel, which were supposed by him to sustain his views, but we do not think his position is sustained by those cases; on the contrary, the authorities cited, properly considered, are against him. "Thus," says Mr. Bishop, "if the charge is that the defendant did such and such things to the disturbance of a public meeting, so much of those specific things must appear in the evidence to have been done as were necessary to constitute the offense; it not being permissible to show, instead, other acts of disturbance which would have been sufficient had they been alleged." (Bish. on Cr. Pro., Sec. 234.) "And where a statute made it an offense to be a common seller of 'spirituous or intoxicating liquors' without license, and the defendant was charged with being such common seller of 'spirituous and intoxicating liquors,' it was held that, though proof of the liquor being either spirituous or intoxicating, would satisfy the demands of the statute; yet to meet the allegation of the indictment it must be shown to be both." (Id.) That is very true in that case. The words spirituous and intoxicating describe the particular liquors—they are descriptive of the liquors, *i. e.*, those liquors were both spirituous and intoxicating. (See also Sec. 336, Bish. on Cr. Pro.) The proof of a sale of spirituous but not intoxicating, or intoxicating but not spirituous liquors, would not establish the sale of the kind of liquors alleged, and thus there would be a variance.

In this case the statute makes it an offense to mail a notice showing where, or how, or of whom, or by what means the articles may be obtained or made; but the in-

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dictment alleges it in the conjunctive, "where they may be had and made." The proof of either is an offense, and proof of either would be sufficient to support the charge made in the indictment. This, however, is a question of proof which does not affect the decision on demurrer.

We are of the opinion that the indictment is good, and that the demurrer should be overruled.

THE FREMONT.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 26, 1876.

1. COLLISION—BURDEN OF PROOF—ANCHOR WATCH.—Where a vessel breaks from her moorings, and comes into collision with another vessel also at anchor, the burden of proof is on the former to show *vis major*, or inevitable accident. The injured vessel held not to be in fault for omitting to set an anchor watch.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, for libellants.

Milton Andros, for claimants.

HOFFMAN, J. On the twenty-fourth of January, about midnight, the barquentine *Fremont*, then lying at anchor in the harbor of Port Townsend, broke from her moorings and was driven by the wind against the schooner *Alice*, inflicting upon her considerable damage. The vessels remained in contact until late in the afternoon of the succeeding day, when they were separated by the aid of a steamer.

Both vessels were in a proper and usual place of anchorage. Their distance from each other on the evening before the accident was from one-quarter to one-half a mile. The harbor is not a dangerous one, though severe gales are sometimes experienced. The holding ground is good. Under these circumstances, the burden of proof is on the *Fremont* to show that the collision occurred without fault on her part.

On this point a single authority will be sufficient. In the case of *The Louisiana*, the Supreme Court says: "The collision being caused by the *Louisiana* drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major*, which human skill and precaution and a proper display of nautical skill could not have prevented." I have been unable to discern in the evidence produced on the part of the claimants any satisfactory grounds for considering that the collision was caused by either a *vis major* or inevitable accident. Undoubtedly the wind blew with some violence. But it is equally beyond doubt that the ground tackle on board the *Fremont* would have been abundantly sufficient to hold her if used seasonably and with proper skill.

She had but one, and that probably an insufficient, anchor down. The scope of chain paid out would seem to have been sufficient if the witnesses of the claimant are to be relied on. It appears, however, that she came to anchor on the evening of the 24th, with the intention of getting under way about midnight, when the tide would serve. There were no indications of an approaching storm. It may be presumed that the master, aware that he would have to weigh anchor in a few hours, did not pay out more chain than he thought absolutely indispensable. He was first aroused about ten minutes before the vessels came together by hearing the noise of the chain passing through the hawse pipes. He came on deck and continued to pay out chain for some minutes, but it was not until within a very short distance of the *Alice* and too late to prevent the collision that he succeeded in letting go his best anchor. From some expressions of the master of the *Fremont* subsequently to the collision it would seem that he attributed the accident to the insufficiency of his smaller anchor, of which he was previously aware. As to the admissibility of such declarations see *The Potomac*, 8 Wall. 584; *The Enterprise*, 2 Curtis, 320.

On this evidence I do not, however, lay much stress. But it is plain that in the absence of any *vis major*, or irre-

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sistible violence of the elements, the accident must have been occasioned by the want of due care, caution and skill on the part of the *Fremont*. Whether that consisted in not having out an anchor of sufficient size, or in not paying out enough chain originally, in not giving her more chain when she began to drag, or in not having her best bower ready to let go at a moment's notice, it is immaterial to inquire—for it is evident that by the skillful and timely use of the appliances at his command, the master of the *Fremont* could have avoided the accident.

It is contended that the *Alice* was also in fault in not having an anchor watch set. That it would have been practicable for a seaman keeping an anchor watch on deck to have done any thing to avert or modify the effects of the collision, is by no means shown. The only expedients suggested as proper to have been adopted are hoisting the jib and sheering the vessel by shifting her helm. But the first operation, even with all hands on deck, would probably have required more time than the suddenness of the danger allowed. And whether the second would have had any beneficial effect depended upon whether the tide was running with sufficient strength to act upon the rudder—a point which the evidence leaves extremely doubtful. I am not, however, disposed to deny that if the *Alice* neglected any usual and proper precaution, and omitted anything which either positive law or maritime usage requires, it will be for her to show that the neglect in no degree contributed to the accident. But the proofs fail to establish any general custom or rule of navigation which requires an anchor watch to be set on small vessels when lying in a harbor. The practice of the masters seems to be various. If the weather is threatening, or the anchorage dangerous, the watch is usually set. But if there be no reason to apprehend danger, and when the crew being in port have been working all day, it is not uncommonly dispensed with. Under circumstances closely analogous, the learned judge of the Southern District of New York came to the conclusion that a schooner was not in fault in not having an anchor watch. (*The Schr. Clara*, 5 Bened. 385.)

Points decided.

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I see nothing in the case at bar to distinguish it from the numerous cases in the books where a vessel insufficiently moored drags her anchors, and collides with another vessel securely anchored and in a proper place. Unless under very exceptional circumstances the colliding vessel is in such cases uniformly held liable.

A decree in favor of libellants must be entered.

W. T. WYTHE v. JARED HASKELL.
W. T. WYTHE v. COOK.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 27, 1876.

1. TITLE OF SETTLER UNDER DONATION ACT.—A settler under the Donation Act of Oregon acquires title to his donation from the passage of the act or the date of his settlement; and the patent which issues to him upon the performance of the conditions upon which the grant was made, is only record evidence of the existence of such title, or of the facts out of which it arose.
2. PARTITION OF DONATION TO MARRIED SETTLERS.—Under said act the surveyor-general had authority to partition the donation of a married settler, in equal parts as to quantity, between him and his wife, at any point of the compass he might deem expedient; but his action in this particular, under section 1 of the act of July 4, 1836, (5 Stat., 107) was subject to the supervision of the commissioner of the general land office.
3. PATENT TO FOLLOW CERTIFICATE.—When the surveyor issued a certificate to a settler under the Donation Act, the commissioner of the general land office was required to issue a patent thereon and in conformity therewith, unless he found some valid objection thereto; and if said objection was found, it could not be disposed of by issuing a patent so far contrary to the certificate, but the certificate should have been returned to the local office for correction, and the patent issued upon such corrected certificate.
4. CERTIFICATE AND PATENT PARTS OF ONE TRANSACTION.—A certificate and patent thereon, issued under said act, are parts of the same transaction or procedure, and may be read together for the purpose of correcting or explaining the patent, and where there is an absolute contradiction between them, the certificate must prevail.
5. THE TERMS "SOUTH" AND "NORTH" HALF OF DONATION CONSTRUED. On July 28, 1853, the surveyor-general issued a certificate to William H. Willson and Chloe A., his wife, for donation 44, including the site of the town of Salem, assigning therein "the north half, parallel with

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with the south line of the claim, to Chloe A. Willson, and the south half to William H. Willson," upon which certificate, on February 4, 1862, a patent was issued, giving to said William H., "the south half" of said donation, and to said Chloe A., "the north half" thereof: *Held*, that the certificate and patent, taken together, showed that the partition line of the donation was a line running south, 70 degrees 21 minutes east, and parallel with the southern boundary of the tract, and not a due east and west one.

Before DEADY, District Judge.

The facts appear in the opinion of the Court.

Addison C. Gibbs, P. C. Sullivan and Ellis Hughes, for plaintiff.

J. Quinn Thornton and Joseph N. Dolph, for the defendants.

DEADY, J. These actions are brought by the plaintiff—a citizen of the State of California—to recover possession of lots 8 in block 64, and 6 in block 46, situated in the town of Salem. He alleges that he is the owner in fee simple of said lot 8, and that the defendant Haskell, unlawfully withholds the possession of it; and, also, that he is the like owner of the undivided two-thirds of said lot 6, and that the defendant, Cook, unlawfully withholds the possession of the same. On March 11, it was stipulated by the parties that an agreed state of facts therefore filed should stand as the special verdict of a jury in each case, and that the court should give such judgment thereon as the law of the cases requires.

By these special verdicts it is substantially found that on July 28, 1853, there was issued by John B. Preston, the surveyor-general of Oregon, a certificate numbered 20, under the Donation Act of September 27, 1850, from which it appears that William H. Willson claimed a donation under said act, numbered 44, of a tract of public land, containing 615 $\frac{1}{10}$ acres, known and designated on the surveys and plats of the United States and particularly bounded and described as in said certificate specified: "The north half parallel with the south line of the claim, to Chloe A. Willson, wife of said William H. Willson, and the south half

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to William H. Willson." That said William H. had proved "to the satisfaction of the surveyor-general," that his settlement on such land was commenced in November, 1844, and he had resided upon and cultivated the same as required by section 4 of said act; and that said facts and the evidence thereof were thereby certified to the commissioner of the general land office, "in order that a patent may be issued to said claimant for said tract of land, as required by the seventh section of the act aforesaid; *provided*, the said commissioner shall find no valid objection thereto."

That afterwards, on February 4, 1862, a patent was issued upon said certificate which recites substantially, that said certificate "has been deposited in the general land office," and that it appears therefrom "that the claim of William H. Willson, and his wife, Chloe A. Willson, * * * has been established to a donation of 640 acres of land, and that the same had been surveyed and designated as claim No. 44," being parts of certain sections and bounded and described as stated in said certificate, containing 615 $\frac{1}{100}$ acres; and then declares that the "United States, in consideration of the premises and in conformity with the provisions of the act aforesaid, have given and granted, and by these presents do give and grant unto the said William H. Willson the south half, and to his wife, Chloe A. Willson, the north half of the tract of land above described; to have and to hold the said tract with the appurtenances unto the said William H. Willson, and his wife, Chloe A. Willson, and to their heirs and assigns forever, the respective portions as aforesaid."

That the premises in controversy are within the limits of the town of Salem, and the exterior lines of said donation claim; that said claim is in compact form, as appears from a plat made a part of the verdict, but none of its exterior lines run with the cardinal points of the compass; that the southern boundary runs south 70 degrees 21 minutes east, while none of the other three sides of the claim are bounded by continuous straight lines; that at and before the issuing of said certificate said surveyor-general duly designated the

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portions of said donation accruing to the husband and the wife as therein mentioned; and that thereafter the said Willson and wife, during their lives—the former having died in 1856 and the latter in 1874—treated said designation and partition as the true one. That as to the premises in controversy, the plaintiff is the successor in interest of said Chloe A., and the defendants of said William H., and that the same are situated to the south of the dividing line described in the certificate, but to the north of a line running due east and west, and dividing the donation in two equal parts.

Upon these findings the question arises, which is the lawful line between the husband's and wife's share of the donation, a line running due east and west, or one running parallel with the southern boundary of the claim? If a due east and west line is the correct one, the premises are upon the wife's part, and the plaintiff is entitled to recover the possession; but, in the other case, they are upon the husband's half, and the defendants are rightfully in possession. On behalf of the plaintiff it is argued that the action of the surveyor-general in dividing the donation between the husband and wife was subject to the supervision and control of the commissioner of the general land office; and that the designation in the patent of the husband's and wife's part was an exercise of that supervisory power, and the final action and judgment of the highest authority over the subject, and therefore so far as the patent differs from the certificate in this respect, the latter is superseded and set aside.

The defendants maintain that the action of the surveyor-general in making the division between the husband and the wife is not subject to review, and, therefore, so far as the patent differs from the certificate in this respect it is void; and also, that the patent and certificate are parts of the same transaction, the former being based upon and referring to the latter, and therefore they must be read together.

Section 4 of the donation act, of September 27, 1850, under which this donation was obtained, gave, by words of

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present grant, to a settler on the public lands in Oregon, before December 1, 1850, who had resided upon and cultivated the same for four successive years, if a married man, six hundred and forty acres thereof, one-half to himself, the other half to his wife, to be held by her in her own right, and provided that the "surveyor-general shall designate the part inuring to the husband and that to the wife, and enter the same upon the records of his office." The act also provided (sections 6 and 7), that the settler should give notice of the precise tract claimed by him, and make proof of compliance with the act before the surveyor-general, who should thereupon issue a certificate, setting forth the facts in the case, and return the proof so taken to the commissioner of the general land office, when, if he "find no valid objection thereto, a patent shall issue for the land according to the certificate." Section 15 declares that "all questions arising under the act shall be adjudged by the surveyor-general, as preliminary to a final decision according to law."

The title of a settler under the donation act vested in him upon the passage of the act or the making of his settlement, if the former was prior to the latter, subject to the performance of the conditions upon which the grant was made. (*Chapman v. School District*, 1 Deady, 113; *Fields v. Squires*, Id. 378; *Lamb v. Starr*, Id. 451-3; *Lamb v. Davenport*, 1 Saw. 638; *Mizner v. Vaughn*, 2 Saw. 274; *Adams v. Burke, ante*, 415.)

The patent did not pass the title to Willson and wife, but is only record evidence of the existence of their title, and the facts out of which it arose. The words of release and transfer contained in the patent are part of an established formula, and are only intended to operate in cases where the government has some interest in the premises. They could be of no effect in this case, because the instrument shows upon its face that the title of the government was before vested in Willson and wife under the donation act. Therefore the patent is in law only a record of the previously existing rights of their donees. (*Langdeu v. Hanes*, 21 Wall. 529.)

Until the partition was made, the husband and wife were

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tenants in common of the whole donation. The power to make this partition was vested by the act in the surveyor-general, without qualification, and the parties had no control over it. It follows that he might divide it, so that an equal number of acres was assigned to each, by a line running to any point of the compass or parallel to any exterior line of the claim. But I think his action in this particular was subject to review. It is not declared in the act to be final; and by the act of July 4, 1836 (5 Stat. 107), re-organizing the general land office, "all the executive duties," then or afterwards prescribed, by any law, touching the disposition of the public lands or any private claim thereto, were made subject to the supervision and control of the commissioner of said office. The making of this partition was such a duty, and the action of the surveyor-general in discharging it was subject to the supervision and control of the commissioner. If he exceeded his power or abused his discretion, it would be the duty of the commissioner to interfere and correct his action. (*Barnard's Heirs v. Ashley's Heirs*, 18 How. 44; *Castro v. Hendricks*, 23 How. 443; *Leroy v. Jamison*, ante, 369.)

Besides, section 13 of the act, as above quoted, having declared that the decisions of questions arising under the act by the surveyor-general should be only preliminary, and section 7 having provided in effect that patents should not issue according to the certificates of the surveyor-general, when it appeared to the commissioner that there was any valid objection thereto, both go to show that it was the intention of Congress to subject the action of the former to the supervision and control of the latter, particularly in the allowing of certificates for donations, which, in the case of married persons, practically included the partition thereof. Although the language in the certificate and patent, describing or indicating the partition is not the same, they are not necessarily contradictory, and therefore it does not follow that it was intended to correct or change the former by means of the latter. For, if the commissioner had found an objection to the certificate upon this point, instead of undertaking to correct or change it directly, he would, as

the practice is understood to have been, returned it to the surveyor-general, with directions to change the partition; as, for instance, to make it by an east and west line instead of one parallel to the southern boundary of the claim, and then have issued a patent upon such corrected certificate. Indeed, it is very questionable whether the commissioner was authorized to alter or modify the effect of a certificate as to the partition or otherwise, by means of the patent or in any way, except by returning the certificate to the local office and directing the desired alteration to be made in it. The commissioner had no power to issue a patent except in pursuance of law, and in this case the act expressly provides that "patents shall issue for the land according to the certificate aforesaid;" that is, in conformity with a certificate to which he had found no valid objection. The act does not contemplate that there shall be any difference in the scope and operation of the certificate and the patent, but that the later is based upon and conforms to the former.

In the case at bar, taking the patent and applying it to the plat or survey of the donation—which was also a part of the facts or proceedings upon which the patent is founded, and with which it was required to conform—the question arises at once whether it was intended to divide the donation by a due east and west line or a line parallel to its exterior north and south lines.

The southern and northern boundaries not being parallel and the southern one being the only one that is a continuous straight line, the most reasonable, if not the necessary conclusion is, that if the donation is to be divided by a line parallel to any of its exterior boundaries, it must be the southern one. This line runs so near east and west that a partition upon a line parallel to it, might be said to give the north half to one party and the south half to the other. In addition to this the proposition is plausible, that a grant of the north or south half of a tract of land, lying in a compact form and bounded on one side—the south side—by a continuous straight line, running within nineteen degrees and thirty-nine minutes of a due east and west course, ought in the absence of anything showing a contrary intent, to be

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understood and construed as applying to the half lying to the north or south of a line parallel with such south boundary. But it must be admitted that according to the primary and natural sense of the terms used in the patent describing the division of the land the partition line is a due east and west one. The expression—the north half of a tract of land—would ordinarily be understood as the moiety which lies to the north of a due east and west line, and the south half, is the remainder or what lies to the south of that line. This proposition is self-evident and cannot be made plainer by argument. But if the description in the patent of the two halves of the claim be read in conjunction with that in the certificate, the uncertainty in the patent is dispelled, and it becomes apparent that the donation was divided by a line running parallel to the southern boundary of the tract.

The plaintiff insists that this cannot be done because the patent does not refer to the certificate in this particular, and for the reason, that all which preceded the patent is merged in it, and cannot now be used to control or affect it. The defendants insist that the patent refers to the certificate and thereby adopts it, and therefore the two must be read together. As has been stated, the patent mentions the certificate and purports in a general way to be issued upon it. Not only this, but it substantially recites it, except as to the division of the claim. Upon this point it is silent. Neither does it otherwise specially adopt or refer to the certificate.

True the grant in the patent of the south and north half of the donation to Willson and wife, respectively, purports to be made “in consideration of the premises,” but the “premises” are the preamble to the patent, which does not specially refer to the certificate, or recite that portion of it which designates the part inuring to the husband and the wife. The rule of law relied upon by the defendants, which declares that where a deed refers to a description of the premises contained in another writing, such description is thereby made a part of the deed, is admitted. (*Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121.) But it does not appear that there is any safe ground upon which to

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rest a conclusion, that this patent refers to the description or designation of the partition given in the certificate.

But I do not think it necessary that the patent should specially refer to or adopt the description in the certificate, to make it a part of it. The former is based upon the latter, and must conform to it. If it is uncertain or insufficient in its descriptive clause, reference may be made to the certificate. They are parts of one transaction or procedure, successive but dependent and related steps in the progress of ascertaining and making an official record of a pre-existing fact or matter, to wit: the settlement, residence and cultivation of the settler, Willson, upon the public lands, whereby he and his wife each became the owner in fee of a designated half of a compact of six hundred and forty acres thereof. This being so, the designation of the partition in the patent may be read and construed in conjunction with that in the certificate. (3 Opin. 111.) If they are contradictory and irreconcilable, in my judgment, the latter must prevail. The patent cannot lawfully issue, otherwise than in accordance with the certificate. The former is only intended to be an amplification and confirmation of the latter, and if it varies from it in any material particular, it is probably so far void.

For the same reasons, if the description in the certificate should materially vary from the plat or recorded survey of the donation, the former being based upon the latter and necessarily required to conform to it, the description in the plat would prevail.

Taking then this certificate and patent together and reading them as parts of the same record, it appears first, that the surveyor-general partitioned this donation between the husband and wife by a line running parallel with the south line of the claim, and designated the half north of this line as the part inuring to the latter, and that to the south of it as the part inuring to the former. So far there is no difficulty in the matter. The certificate being deposited in the general land office, and the commissioner, finding no valid objection thereto, caused this patent to issue upon and in confirmation of the same. In describing the parts inuring

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to the husband and wife respectively, instead of giving the course of the partition line, the patent simply says the south half to William H., and the north half to Chloe A., his wife. It may be admitted that, strictly speaking, there can be but one north half of a donation, and that must be bounded on the south by a line running due east and west. But the patent is not speaking in the abstract, but the concrete, of the halves into which this tract had already been divided by the surveyor-general, as appeared by the certificate from which it was drawn. The patent did not initiate the partition; it only confirmed and recorded one already made. Under the circumstances, therefore, it was natural, proper and convenient that the patent should describe the part inuring to the husband as the south half, meaning thereby the half lying to the south of the partition line described in the certificate. Relatively, the parts of the donation assigned by the patent to the husband and wife are the north and south halves of it. They are the north and south halves, because they are not the east and west ones.

Reading the certificate and patent together, there is no other reasonable or even possible conclusion, but that the partition line is one running parallel with the south line of the claim. The patent is not in conflict with the certificate, but is only obscure where the other is plain. But if this were otherwise, it would not affect the result. Upon both reason and authority, I am satisfied that so far as a patent varies from the certificate, upon which it issues, it is without authority of law and therefore void. A patent can only issue upon a certificate to which no valid objection is found, and therefore must, in the nature of things as well as by the express words of the act, issue in accordance with it. If objection is found to the certificate it cannot be corrected by the patent, but the certificate must be corrected and the patent issue upon it, and in conformity with it. Therefore, there can be no presumption that the commissioner objected to this partition, by the surveyor-general, and undertook to correct it by the patent, but the contrary; that he

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found it without objection, and the patent issued in confirmation of it.

It appearing from the special verdict that the premises in controversy are, upon the part of the donation, assigned to William H. Willson, the defendants must have judgments in bar of the actions and for costs.

As to the statement in the special verdict concerning the acquiescence of Willson and wife in the partition line named in the certificate, I have not found it necessary to consider what, if any, effect ought to be given to it.

THE UNITED STATES v. J. P. NEWMARK.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 28, 1876.

1. **FORFEITURE—INTENTION TO DEFRAUD.**—Where, in a suit brought by the United States to recover the value of certain goods alleged to have been fraudulently invoiced below their true cost, it appeared that the defendant was not the owner or shipper of the goods, but merely a consignee thereof for the purpose of selling them: *Held*, that knowledge on his part of the fraudulent under-valuation was necessary to establish the "actual intention to defraud the United States" within the meaning of the sixteenth section of the act of June 22, 1874.

Before **HOFFMAN**, District Judge.

Walter Van Dyke and *John M. Coghlan*, attorneys for the United States.

Latimer & Morrow, *C. A. McNulty*, *E. B. Mastick*, and *Eastman & Neuman*, attorneys for defendant.

HOFFMAN, J. This is an action brought by the United States to recover the value of certain hides alleged to have been fraudulently imported into this port by the defendant. The alleged fraud consisted in entering the goods by means of false and fraudulent invoices, which stated the cost of the goods at the place of exportation to be a less sum than the actual cost thereof, with intent to evade a part of the duties thereupon and legally chargeable thereon.

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By the sixteenth section of the act of June 22d, 1874 (18 Stat. at Large, p. 189), it is in substance provided that in all actions to enforce a forfeiture or to recover the value of goods by reason of any violation of the provisions of the customs revenue laws, it shall be the duty of the court to submit to the jury as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by the jury, and if the cause be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact, and unless intent to defraud shall be so found, no fine, penalty or forfeiture shall be imposed.

Two separate issues are thus presented in this case: 1. Were the goods undervalued in point of fact and the invoices thereof false; and, 2. Were the entries of the goods made with an actual intention on the part of the defendant to defraud the United States.

The evidence as to the actual cost or market value of the goods at the places of exportation is very voluminous and conflicting. I have not thought it necessary to enter into an elaborate analysis of it, as the plaintiffs have, in my judgment, failed to prove the actual fraudulent intent on the part of the defendant which the statute requires the court to find as a distinct and separate proposition before a forfeiture can be imposed. In discussing the evidence bearing upon this proposition, I shall therefore assume that the goods were in fact invoiced at less than their cost. The question is, did the defendant know it? The number of false entries upon which the action is brought is twenty-seven. They were made during a period extending from July 29, 1869, to February, 1872. If the defendant was the owner of the goods, or, if the importations were made on his account, the inference would be irresistible that he was aware of the false valuation. He could not have failed to know what prices he paid for them. But he contends that in every instance he was a bare consignee, that he had no knowledge of the price paid by his consignor, and that he

merely sold the goods and placed the net proceeds to the credit of the latter.

To these facts the defendant testifies in the most positive manner. To meet this proof the government has produced the entries made at the Custom House with the oaths and invoices that accompany them. From these entries it appears that in twelve instances out of twenty-seven the defendant on entering the goods took the "owner's oath" instead of that of a consignee. It is replied that this was done through the mistake of the broker who prepared the papers, and in support of this averment the defendant appeals to his books. The entries from the Custom House show that on the first five importations the defendant took the consignee's and not the owner's oath. The entry of the sixth importation is missing. But in all of these instances the journal of the defendant shows that the proceeds of the goods were credited to the consignor. The book containing the copy of the account of sales of these shipments rendered to the shippers is not produced. It is alleged to have been destroyed. The evidence on that point will be considered hereafter.

On the seventh importation the defendant took the owner's oath. He claims that this was by the mistake of his broker, and in support of his assertion refers to the fact that the consular certificate presented with the invoice to the Custom House shows that the consignor was the shipper and owner. He also exhibits the entries in his journal where the proceeds are duly credited to the consignor, and his press-copy account of sales, in which an account is rendered to the consignor of the proceeds of and charges upon the goods.

The circumstances are similar in regard to the eighth importation. The defendant took the owner's oath. But the consignor declares before the consul that he is owner and shipper, and the journal and account-sales-book show that an account sales and charges was duly rendered to the shipper, and a corresponding credit given in the journal. It is unnecessary to state in detail the circumstances as disclosed by the Custom House papers and the defendant's

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books with regard to each importation in which he has taken the oath as owner. They may be summarized as follows:

In six instances out of the twelve the papers show that the shipper declared before the consul that he was the owner of the goods shipped. In the other cases he declared himself to be the shipper. In every instance but two, both the journal and the account-sales-book show that accounts of sales of the goods were duly rendered to the shippers, and credits duly given in the journal. In the two instances referred to, the entries in the journal cannot be found. But the accounts of sales are produced. In every other instance the oath taken by the defendant is that of a consignee. The journals show a credit given to the shipper, and the account-sales-book an account rendered to him, except as before stated in the case of the first six importations, the account-sales-book relating to which has been destroyed.

The broker employed by the defendant corroborates in the most positive manner the testimony of the defendant. He states that his instructions invariably were to enter the goods in the name of defendant as consignee, and that if the form of oath as owner has been filled out and submitted for his signature it was through mistake. He attributes the error to the great haste with which business of this nature is necessarily conducted. He might with probably equal truth have added that such errors arise from the laxity and carelessness which universally prevail when any "custom-house" oath is to be taken or administered. The broker's statement as to his mistakes or those of his clerk is confirmed by the fact that in several instances where the owner's oath was taken by the defendant the papers themselves disclosed that the shipper was the owner. No proof has been offered on the part of the United States to rebut the evidence on this point produced by the defendant. The correspondence between himself and the shippers of the goods for a considerable period has not been produced. The District Attorney suggests that it may have been purposely destroyed. But the defendant has shown by his own testimony, by that of his partner, and by the porter in his

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employment, that the papers in question were packed in a box and placed in a cellar where they became saturated with water and rat-eaten. His partner ordered them burnt up as useless, which was done by the porter. This occurred, they assert, before this suit was commenced or anticipated. This evidence is uncontradicted except by some testimony tending to show that it was possible that the defendant might have been aware that some investigations with regard to these importations were on foot.

We are, I think, justified in concluding that the Government has failed to establish a guilty knowledge of the falsehood of the invoices, and the consequent intent to defraud, from any relation of the defendant to the goods as owner. But if he had that knowledge as agent, merely, it would be sufficient to establish the fraudulent intent. But of this there can scarcely be said to be any proof. The defendant had, as he testifies, no interest whatever in the shipments, not even by way of commissions. His remuneration was derived from commissions on purchases made by him at this place, of goods to be shipped to his correspondents. No commissions were charged by him on goods consigned to him for sale.

The price at which the goods in question were valued in the invoices had been for a long time uniform and universal among all the importers. They appear to have valued them at one dollar and fifty cents each, irrespective of their quality or condition. This valuation had been for years accepted as just by the custom-house authorities. I see no reason for supposing that the defendant, receiving the goods as he did, would be more likely to know their real cost or true value than the officers of the government charged with the duty of ascertaining those facts. If, however, the facts were clear and the undervaluation gross and undeniable, we might still suspect that the defendant must, in the course of his business, have become aware of it. But even after the very full investigation which the subject has undergone in the trial of this cause, the evidence remains very conflicting, and the conclusion to be reached open to doubt. It is, I think, plain, that parties at this place who sought

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to engage in the trade were unable to obtain at Mazatlan, La Paz, and Cape St. Lucas, hides at the price at which these goods were invoiced. The explanation of this fact, given by the defendant's witnesses, is that the trade in hides is at these places in the hands of a small number of persons who enter into contracts with the rancheros to take all their hides, of whatever quality, at a fixed price, and to make advances to them on the credit of the hides to be subsequently delivered. They thus have, it is said, a kind of monopoly which not only enables them to secure hides at a lower rate than that which a foreigner would be obliged to pay, but also to advance the prices at the ports of shipment. It is also testified that when "culls," or damaged hides, bull hides, etc., are taken into account, an average price of one dollar and fifty cents is not an unfair statement of the cost, although selected lots might be worth much more. A large number of witnesses testify to these facts, among them three ex-consuls of the United States, who are acquainted with or have been engaged in the trade.

What conclusion should be reached after a careful consideration of all the testimony, I have not determined, and it is unnecessary now to decide. I advert to the state of the proofs merely to show that the undervaluation, if any, was not so gross and indisputable as to justify the belief that it was notorious to all engaged in the trade, and consequently was known to the defendant. On the issue, therefore, upon which, by the terms of the act, I am required to pass as a distinct and separate proposition, I find that it is not proved that the acts alleged in the complaint were done with an actual intention to defraud the United States.

Judgment must, therefore, be entered for the defendant.

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refused to enjoin an execution and sale until the partnership accounts were taken and liquidated, on the ground of the absence of precedents. But Mr. J. Story considers this an insufficient reason for denying the injunction, and Mr. Ch. Kent admits in his commentaries (vol. 3, p. 65, 5th ed *in nota*) that the more fit and suitable rule of practice would seem to be to have the adjustment of the partnership accounts precede the sale.

In *Douglas v. Winslow*, 20 Main 92-3, Mr. Justice Weston, speaking of the right of a separate creditor to attach the interest of one partner in the goods of the firm, says, "This right has been repeatedly exercised and has never been defeated so far as the cases have come to our knowledge, unless in behalf of partnership creditors." So in *Tuppan v. Blaisdell*, 5 N. H., 193, it is said by Richardson, C. J., to be well settled that partnership property cannot be holden to pay the separate debt of an individual partner until all the partnership debts are paid. All that can be taken is the interest of the debtor in the firm—not the partnership effects themselves, but the right of the partner to a share of the surplus that may remain after all the debts are paid."

In Vermont the partnership creditors are in equity preferred to separate creditors, out of the partnership assets of an insolvent firm, notwithstanding the separate creditors have first attached those assets. (*Washburn v. Bk. of B. F.*, 10 Law. Rep., 269; *Bardwell v. Perry*, *id.* 257.)

Mr. Ch. Kent states the rule to be "that partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such separate partner in the effects of the settlement of all accounts: The sale is made subject to the partnership debts, and is, in effect, only a sale of the undefined surplus interest of the partner defendant, after the partnership debts are paid." He adds in a note, "the doctrine of moieties is now exploded, and the creditors under execution or process of foreign attachment, or assignees of a partner or purchasers at sheriffs' sales, can take only the interest of the debtor in the partnership

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funds, subject to the accounts of the partnership. That interest, and not the partnership effects is sold, and that interest is merely the share found to belong to the debtor upon an adjustment in equity of the partnership accounts." (See Story on Partn., sec. 261. 262.) Mr. Gow, on Partn., sec. 365, says "The levy under the execution transfers no part of the joint property. It merely gives the right to an account."

I do not understand that these general and, indeed, elementary principles are denied. But it is contended that the purchaser at the executions, or his assignee, may now hold the partnership property bought by him freed from the claims of the joint creditors, because the interest of both parties has been levied on and purchased by him, and this accounting is not now asked for by either partner. No authority is cited for this position. The rights to be protected are those of the joint creditors; and perhaps those of the separate creditors might be involved if the plaintiff in the two suits against the individual partners is allowed to appropriate all the joint assets. The Bankrupt Act explicitly directs that the joint assets shall be first applied to the payment of joint debts, and the separate assets to the payment of separate debts. The right thus given to these classes of creditors, respectively, is absolute, and must be enforced by the court. It is conferred by law, and is not evolved out of, or through the equity of the partners, which is by some supposed to be the only foundation of the analogous rule of the Court of Chancery. The sale on execution of either or both the partners' interest in the joint assets in satisfaction of a separate debt gave to the purchaser, as we have seen, only an interest in the assets which might remain after the payment of the partnership debts. The fact that he purchased the interest of two of the partners sold on separate executions, can have no effect to enlarge the interest of either acquired on the separate sale of that interest. He took merely a right to an account, and can now hold the partnership assets only subject to that account, and in entire subordination to the claims of the joint creditors. If, upon the settlement of the joint estate, any surplus should

result in favor of either of the partners, it will belong to the purchaser of the interest of that partner, provided the judgment be valid and not obnoxious to any objection under the Bankruptcy Act. This is all the interest which the sheriff could sell, or has pretended to sell, and all the purchaser could acquire.

In the case of *Menagh v. Whitwell*, 52 N. Y. 149, the question presented in this case was elaborately examined. It was there held, upon reasons which admit of no answer, that when a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefore discharged out of the property, are not divested by the sale. And this right is not affected by the fact that the separate interests of all the partners are thus disposed of. It was further held, that partnership debts have, in equity, an inherent priority of claim to be discharged out of the partnership property, and as between a firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to strangers by either one or all of the partners in payment of their individual debts, or by proceedings against them separately with reference to their individual interests; and when there has been no transfer by the firm, and the property remains in specie, and capable of being levied upon, it may be followed in the hands of those claiming by virtue of such transfers or proceedings, and may be levied on by a judgment creditor of the firm. I consider this authority decisive.

The question whether the leasehold property was firm assets will of course remain open to contestation. Premises used by partners for the purpose of carrying on their trade *prima facie* form part of the partnership property. (*Featherstonhaugh v. Fenwick*, 17 Ves. 308.) But this presumption may be rebutted. Until this question can be determined, and an account taken if the property be found to be firm assets, the injunction against the defendant must be retained. Perhaps the more regular course would be to appoint a receiver to collect the rents *pendente lite*. But I see no objection to permitting them to

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be collected by the assignee, to be held by him as a distinct and separate fund, and to be accounted for to the defendant if the property should not be found to be firm assets, and the judgments and levies prove to be regular and valid, or if, after liquidating the partnership accounts, any surplus should result in favor of either partner individually.

In the meantime, he should be enjoined from parting with the certificates, and collecting or attempting to collect the rents.

W. T. WYTHE v. A. MYERS.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 10, 1876.

1. **IRRELEVANT ALLEGATION.**—In an action to recover the possession of real property, a statement in the answer of the grounds upon or means by which the defendant claims to be the owner of the property is irrelevant, and may be stricken out on motion.
2. **FRIVOLOUS ALLEGATION.**—An allegation in the answer to the effect that the defendant derives title to the premises from the administrators of W. H. Willson, it not appearing that said Willson was ever seised or possessed of the property, is frivolous, and may be stricken out on motion.
3. **SAME SUBJECT.**—An allegation that the administrators of said Willson conveyed the premises to the defendant's grantors on March 30, 1859, "in obedience to an order of the Probate Court of Marion county," of March 29, 1859, may be stricken out as frivolous and irrelevant—it not appearing therefrom that said order was duly or lawfully made, or that such court had authority to make the same.
4. **ALLEGATION OF OWNERSHIP.**—The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title from which it does not appear that he is such owner, the matter may be stricken out as sham.
5. **COUNTER-CLAIM FOR IMPROVEMENTS.**—A counter-claim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used.
6. **DAMAGES FOR WITHHOLDING POSSESSION.**—The right to damages for withholding the possession of real property given by the Oregon Code, (Secs. 313, 318) is equivalent to the action of trespass for mesne profits

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- given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well for waste committed or suffered by the occupant as the value of the use and occupation; such right is a distinct cause of action, and if joined with a claim for possession, should be separately stated.
7. STATUTE OF LIMITATIONS.—Lapse of time short of twenty years is not a bar to an action to recover possession of real property where the defendant claims under a sale by an administrator, except where the sale was made under section 42 of chapter V of the Code of 1854, to pay the decedent's debts, and the plaintiff claims under such decedent.
8. CITIZENSHIP OF PARTIES.—If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out; but is not liable to a demurrer.

Before DEADY, District Judge.

Motion to strike out defenses.

Addison C. Gibbs and Ellis Hughes, for plaintiff.

J. Quinn Thornton and W. F. Trimble, for defendant.

DEADY, J. This is an action to recover the possession of lots three and four and a portion of two in block nine, in the town of Salem, together with damages for withholding the same. The complaint alleges that the plaintiff is a citizen of California, and the defendant of Oregon. The answer denies that the defendant is a citizen of Oregon, and in connection with such denial alleges that he is a citizen of California. The answer also contains a denial of the ownership of the plaintiff and his right to the possession. It also contains the following pleas or defenses:

1. That the defendant is the owner of the premises and entitled to the possession of the same; and that he derives title thereto by sundry mesne conveyances from E. M. Barnum and Jesse M. Shepherd, to whom J. G. Willson and C. A. Willson, as administrators of the estate of William H. Willson, conveyed the same on March 30, 1859, "in obedience to an order of the Probate Court" of the proper county made on March 29 of said year;

2. That permanent improvements of the value of one thousand dollars have been made upon the premises by

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those under whom the defendant claims "holding the same by the title thus derived adversely to the claim of the plaintiff, in good faith;"

3. That "more than five years had elapsed between the commencement of this action and the time of making the sale by the administrators aforesaid on March 29, 1859," and the making of the conveyances by said administrators to said Barnum and Shepherd "in obedience to an order of the Probate Court of said Marion county."

The plaintiff moves to strike out each of these three defenses as sham, frivolous and irrelevant. The motion must be allowed. All of the first defense, except the allegation of ownership, is at best a mere statement of the evidence upon which the defendant relies to sustain his claim of ownership, and is therefore irrelevant. But so far as appears, it is also frivolous. How a conveyance of the premises by the administrators of William H. Willson, deceased, could vest or pass the title to any one is not apparent. It is nowhere alleged that said William H. ever owned or had any interest in the property, and it might as well be alleged that the defendant derived title from the man in the moon. But admitting that he died seised of it, the plea does not show that the Probate Court of Marion county ever acquired jurisdiction to direct the administrators to make a conveyance. It is not even alleged that the order was "duly" or "lawfully" made. At the date of this alleged transaction the Probate Court had authority to order the sale of a decedent's lands to pay his debts, and also to order his administrator to make a conveyance of any part thereof which in his lifetime he had become "bound by contract in writing to convey." (Or. Code 1854, chaps. V and VII.)

But this defense of ownership in the defendant does not state under which of these provisions this order was made, nor in any way allege or show that the court had authority to make it. Standing by itself, the simple allegation of ownership in the defendant is sufficient and proper; but being coupled with what follows, it must be understood to

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be only such ownership as such a conveyance would transmit. Thus qualified, it amounts to nothing, and is a sham.

The second defense is frivolous and irrelevant, because it does not appear that such improvements are now of any value, or that they better the condition of the property for the ordinary purposes for which it is owned and used. (*Neff v. Pennoyer, ante*, 495.) It simply alleges that these improvements cost one thousand dollars. What is their present value, of what they consist, and when they were made, does not appear. A counter-claim for permanent improvements is confined to their value at the time of trial, and this value ought to be alleged in the pleading. (Sec. 318, Or. Civil Code.) Besides this defense, although separately stated, does not refer to the cause of action to which it was intended as an answer. (Sec. 72, Or. Civil Code.) I suppose it is intended as an answer to the claim for damages for withholding the possession, but it professes to be in answer to the complaint generally. The only excuse for this is, that the claim for damages is stated in the complaint as if it was only an incident of the right to recover the possession. But this is an error. The right to recover the possession of the property and damages for withholding such possession are separate causes of action, which, for convenience and economy may be joined in one complaint. (Or. Civil Code, secs. 91, 313, 318.) The complaint also alleges that the defendant has unlawfully withheld the possession of the premises for six years, and that the value of the rents, issues and profits during that period is one thousand dollars, which he seeks to recover as something other and different than the five hundred dollars claimed as damages for withholding the possession. The right to damages for withholding the possession of real property given by the Or. Code, secs. 313, 318, is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the property as well for waste committed or suffered by the occupant as the value of the use or occupation. Such right is a distinct cause of action, and

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while it may be joined with a claim for possession, it should be separately stated.

The third defense assumes that in any action to recover premises held under a sale by an administrator, the lapse of five years from the date of such sale, or a less period than twenty years is a bar to a recovery. But I am not advised that any such act was ever in force in this State. Under the Code of 1854, section 42, chapter V, property sold by an administrator on the order of a Probate Court to pay the debts of the decedents, could not be recovered by any one claiming under such decedent after a period of three years. But it does not appear that this plaintiff claims under William H. Willson, whose administrators are alleged to have made this sale. As this statute of limitation applies only to particular cases, the defendant cannot claim the protection of it unless he brings himself within it.

But this defense does not really allege that the defendants are holding under a sale by an administrator. The matter is characterized as "the sale by the administrators aforesaid on March 29, 1859," meaning the transaction mentioned in the first defense, which is not therein alleged to be a sale at all, but simply a conveyance. Now this conveyance, if made by the administrators under any statute of Oregon, must have been made in performance of a contract of sale by the decedent in his lifetime, as provided in chapter VII of the Oregon Code aforesaid. But as to this class of cases, there never was any special limitation short of twenty years in this State, that I am aware of, and none has been pointed out. The plaintiff also demurs to so much of such answer as denies that the defendant is a citizen of Oregon, and avers that he is a citizen of California, because this is a plea in abatement, and cannot be pleaded in conjunction with a plea to the merits.

At common law a party could not plead at the same time, in abatement and bar, to the same matter. (1 Chit. 491.) It has been long held in the national courts that if the defendant disputes the allegation of citizenship in the complaint, he must do so by a plea in abatement, and that this must be done in the order of pleading required by the com-

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mon law. (*Jones v. League*, 18 How. 81.) A plea in abatement cannot be filed with other defenses. (*Spencer v. Lapsley*, 20 How. 267.) But as these decisions are anterior to the enactment of section 914 of the Revised Statutes, adopting the practice in the State courts, it may be said that the question turns upon whether the pleading is allowed by the law of the State or not. The Oregon Civil Code, section 72, provides that a party may plead as many defenses as he may have, but does not prescribe the order in which they shall be pleaded. The most reasonable inference from this silence is that it was intended that the matter should be left as at common law; or, on account of such silence, the court being at liberty to construe the statute, may adopt the rule of the common law if deemed most convenient and promotive of justice. In *Hapwood v. Patterson*, 2 Or. 50, the Supreme Court held that a plea in abatement could not be joined with a plea to the merits.

In *Sweet v. Tuttle*, 14 N. Y. 468, it was held that the non-joinder of a defendant could be pleaded with other defenses; and I am not aware that this decision has since been departed from in that State.

I think the rule laid down by the Supreme Court of this State the better one, and I suppose under section 914, *supra*, it furnishes the rule for the practice in this court.

This defense of the citizenship of the parties is one peculiar to the national courts and upon the question of whether it should be made by a plea in abatement, or a simple denial of the allegation in the complaint, the practice in the State courts furnishes no guide. Under these circumstances it is proper to follow the rule laid down by the Supreme Court, prior to the enactment of section 914, *supra*, in *Jones v. League*, *supra*, and require the objection to be made by a plea in abatement, instead of a mere denial of the allegation in the complaint. Indeed, since the passage of the act of March 3, 1875, 18 Stat. 470, concerning the jurisdiction of the courts of the United States, a mere denial that the defendant is a citizen of Oregon would be immaterial; because by section 1 of that act, this court has jurisdiction, if the controversy is between citizens of differ-

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ent States. It is no longer necessary that one of the parties should be a citizen of the State where the action is brought.

But a demurrer is not the proper proceeding in this case. Matter pleaded in abatement with matter to the merits is deemed waived, and if not withdrawn, may be stricken from the files of the case. The pleading of matter to the merits admits the jurisdiction, and is therefore an implied retraction or withdrawal of matter already or at the same time pleaded in abatement. There is, then, nothing left to demur to. The matter in abatement is not demurrable, because the objection does not appear upon its face, but arises *dehors* the plea, by reason of the pleading of other defenses which are deemed to supersede it. If not actually withdrawn, the convenient mode of eliminating it from the case is a motion to strike out. The demurrer is overruled.

IN RE GOLD MOUNTAIN MINING COMPANY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

APRIL 10, 1876.

1. JUDGMENT LIEN—APPEAL.—Where a creditor had obtained a valid lien on the bankrupt's property by judgment, execution and levy, from which the bankrupt had taken an appeal, but had not executed the bond necessary to cause the appeal to operate as a stay of proceedings, and the property had been sold subsequently to the bankruptcy and the proceeds brought into this court: *Held*, that the creditor was entitled to satisfaction out of the proceeds.

Before HOFFMAN, District Judge.

W. H. Rhodes, attorney for creditor.

Jos. Naphtaly and *R. H. Lloyd*, attorneys for assignee.

HOFFMAN, J. In this case one Morrison had, before the commencement of the proceedings in bankruptcy, obtained a judgment against the bankrupt, issued execution and levied on property which he was about to sell. At

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the instance of the creditors, his proceedings were stayed until the appointment of an assignee. An assignee having been appointed the property was sold, and the proceeds brought into court. The judgment-creditor now moves that these proceeds, or so much thereof as may be necessary, be applied to the satisfaction of his debt.

The validity of the judgment is not impeached. The creditor, therefore, had acquired before the bankruptcy a valid lien which this court is bound to respect and enforce.

The only objection urged against his application is that an appeal has been taken from the judgment in question. But no bonds have been executed by the appellant, as required by law, to cause the appeal to operate as a stay of proceedings. The judgment-creditor, therefore, had, at the time of the bankruptcy, the unquestionable right to satisfy his judgment out of the property levied on, or, in other words, a valid lien upon it. This lien was in no respect affected by the bankruptcy proceedings, and the same rights which he would have had in the State courts he can now assert in this court. As his rights there were unaffected by the appeal, they are unaffected by it here. It would be keeping the word of promise to the ear only, if the court should declare that all lawfully acquired liens not dissolved by the Bankrupt Act will be respected in this court, and at the same time inform the holder that he will not be permitted to enforce them, notwithstanding that he clearly has that right under the State laws, and had it at the time of the bankruptcy.

The motion of the judgment-creditor is granted.

THE UNITED STATES v. CHARLES BROWN.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 12, 1876.

1. LOG-BOOK, ENTRY OF OFFENSE IN.—A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596 of the revised statutes, unless an entry of the circumstances is made by

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the master in the official log-book of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner.

Before DEADY, District Judge.

Separate informations were filed against the defendants in the above-entitled cases, charging each of them with willful disobedience to the lawful commands of the master of the ship, William H. Thorndyke, upon which they were lawfully engaged as seamen on a voyage from Philadelphia to Sitka, at Sitka, on February 14, 1876, by refusing to discharge cargo.

The defendants pleaded not guilty, and were tried together by the court.

The prosecution called the master of the ship, and offered to prove the commission of the offense by him. The defense objected, and demanded the production of proof of the entry in the official log-book concerning the same, as required by section 4597 of the revised statutes. The log-book was produced, but contained no entry on the subject.

Rufus Mallory, for the United States.

David Goodsell and *Joseph Simon*, for the defendants.

DEADY, J. The crimes defined by section 4596 of the revised statutes, which includes the charge against the defendants, relate to the discipline and conduct of the ship rather than the general public. If the master intended to prosecute a seaman for the commission of any of them, it is made his duty by sections 4290, 4291 of the revised statutes, to make an entry concerning the same in the official log-book as soon as possible after the occurrence, and to read the same to the offender, or furnish him with a copy of the same, and enter his reply thereto. Section 4597 of the revised statute provides that "in any subsequent legal proceedings" said entries "shall, if practicable, be produced or proved, and in default of such production or proof, the court hearing the case may, at its discretion, refuse to receive evidence of the offense."

It is maintained on the part of the prosecution that when an entry was made, it must be produced or proved, or the court in its discretion may refuse to hear the evidence in support of the charge, but when it appears that no entry was made, then the statute does not apply. But this construction of the statute would make it almost devoid of meaning and useless. The evident purpose of the statute is to prevent prosecutions for breaches of discipline on shipboard, except in those cases where the master shall deem the matter of sufficient importance, while the circumstances are all fresh in his memory, and before there is any temptation to make use of it as a means to some other end, to enter a charge against the offender, together with his reply, in the official log-book. If any difficulty arises between the crew and the master, a previous offense or dereliction, of which no entry was made, cannot be invoked or trumped up, as a make-weight in this subsequent controversy.

In this case, it appears by the affidavit of the master, made before the deputy collector and *ex officio* shipping master at Sitka, that the defendants, in company with one Antonio Page, attempted to desert the ship in a small boat at Sitka, but being capsized, were discovered and rescued by the officers of the ship, except Page, who was drowned. The defendants then refused to work, and the master, by the advice of the collector, put them in irons until they consented to work, and made this affidavit of the transaction, instead of making an entry in the log-book. The confinement of the defendants was proper enough, if they refused to work, but if it was intended to prosecute them also for the offense of disobeying orders, it was incumbent on the master to have made the proper entries in his log-book. This not having been done, the law presumes that it was not deemed of sufficient importance at the time, but is now sought to be done as an afterthought, or with some ulterior purpose.

The defendants are found not guilty, and discharged.

IN RE FUNKENSTEIN, A BANKRUPT.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

APRIL 18, 1876.

1. PETITIONING CREDITORS — REQUISITE NUMBER AND AMOUNT.—The judgment of the court that the requisite number and amount of creditors have petitioned is final, and the matters so adjudged are not thereafter re-examinable, except in cases of fraud and imposition practiced on the court.

Before HOFFMAN, District Judge.

Joseph Naphtaly, attorney for petitioning creditors.*David Freidenrich*, attorney for opposing creditors.

HOFFMAN, J. The petition against the bankrupt in this case was filed on the ninth of April, 1875. It contained the usual averment that the petitioners constituted one-fourth in number of the creditors of the bankrupt, and that the aggregate of their debts, provable under the act, amounted to at least one-third of the debts so provable.

On the return day of the order to show cause the bankrupt made default and he was adjudged bankrupt. The order was in the form prescribed by the Supreme Court under the original act. It was not modified to accommodate it to the provisions of the amended act of June 22, 1874. With respect to the allegations of the petition the court adjudged "that the facts set forth in the petition were true."

On the twenty-ninth of April the bankrupt filed his duly verified schedules, setting forth his debts and liabilities. On the twenty-first day of May, 1875, the bankrupt filed his petition for discharge. This was opposed by several of his creditors, who also moved that the adjudication be set aside, and the proceedings vacated and dismissed, on the ground that the requisite number of creditors had not joined in the petition, and the debts due them were not of the amount required by the act. The matter was referred to the register, whose report is admitted to be true. It

appears that the petition was signed by seven creditors, representing in the aggregate \$4292 of indebtedness.

By the bankrupts' own schedules it appeared that the number of his creditors whose claims are undisputed are thirty-eight, and the aggregate of the indebtedness due them is \$115,062.76. These schedules were offered in evidence before the register and their accuracy admitted. It thus appears that the petitioning creditors constitute less than a fifth in number of all the creditors, and the debts due them amount to less than a twentieth of the total indebtedness of the bankrupt. Had these facts appeared on the return day of the rule to show cause the petition would have been dismissed as of course.

The question presented is, can the court now take notice of them, and if so, what action should be taken. The statute provides that if on the return day the debtor "shall admit in writing that the requisite number and amount of creditors have petitioned the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject." And if it shall appear that such number and amount have not so petitioned, the court shall grant a reasonable time not exceeding ten days within which other creditors may join in such "petition." If, at the expiration of that time, the requirements of the statute are complied with, the matter may proceed. If not, it is to be dismissed.

It will be observed that these provisions contemplate two cases. The first where the debtor admits in writing the allegations of the petition with regard to the number and amount of creditors, and the second where those allegations are denied. No provision is made for cases where the debtor neither admits nor denies, but merely makes default. In the first case the court is required, if satisfied that the admission was made in good faith, to so adjudge, which judgment is final. In the succeeding section the provisions seem to embrace cases of default as well as those where the bankrupt admits the facts. It enacts in substance that if on the return day of the order to show cause the court shall

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be satisfied that the requirement of the act as to the number and amount of creditors has been complied with, or if within the prescribed time creditors sufficient to make up the required number and amount shall sign the petition, the court shall so adjudge, "which judgment shall be final."

It will be noticed that the form of the adjudication in the case at bar very imperfectly complies with these requirements. The act seems to contemplate a distinct and explicit judicial finding of the fact that the requisite number and amount of creditors have petitioned. And the judgment of the court on that point is made final. The form used merely finds that the allegations of the petition are true. This form, as before stated, is prescribed by the Supreme Court. It has not been modified since the passage of the amended act. The propriety of inserting the more explicit judgment which the act seems to contemplate has been overlooked. But I do not consider that this irregularity is fatal to the proceeding. The judgment of the court that the allegations of the petition are true, embraces all the allegations of the petition, as well those relating to the number and amount of the petitioning creditors as the other necessary averments. The court has in fact passed upon the truth of those allegations as much as on that of the allegations of the residence of the plaintiff, and the date and existence of the act of bankruptcy, which are also facts necessary either to give the court jurisdiction or to authorize the proceeding. The mere circumstance that its judgment has not been so explicit on one point as the act would seem to contemplate ought not to defeat the proceeding. The inconvenience and hardship of so holding would be very great, for the same form has been followed in all cases of involuntary bankruptcy in this district, and it is presumed in many others. The clerks have no doubt very generally contented themselves with following the forms prescribed by the Supreme Court.

The briefs of counsel in the case at bar discuss the question whether the averment with regard to the number and amount of creditors is a jurisdictional averment. On this point the opinions of the district judges are conflicting.

The learned judge of the district court for the eastern district of Michigan, holds that to give the court jurisdiction, the petition must contain a clear, consistent and explicit allegation as to the proportionate number of creditors petitioning, and the amount of debts represented by them. For the want of such an allegation he vacated the order to show cause, and refused to allow an amendment. (*In re Rosenfelds*, 11 B. R., 86.)

In *Ex parte Jewett*, 11 B. R., 443, Mr. J. Lowell, the learned judge for the district of Massachusetts, held that the insertion of the name of one of the creditors instead of that of the debtor, by a clerical mistake, did not vitiate a proceeding under the act to effect a composition, and that notwithstanding the error there was "a case in bankruptcy pending against the debtor." In this case there had been no adjudication. The views of Mr. J. Lowell were adopted by the learned judge of the southern district of New York, in the recent case of *In re Duncan, Sherman & Co.*, where the point raised in the case at bar was distinctly adjudged. In the two previous cases the point upon which the judges differed was whether it was necessary, in order to give jurisdiction, that the petition should contain a clear, explicit, and consistent allegation that the requisite number and amount of creditors had joined in the petition.

In the case at bar as in that of *Duncan, Sherman & Co.*, the petition contains the requisite allegation, and the question really is, can the inquiry as to whether that allegation be true be reopened after the court has, on the return day of the rule to show cause, adjudged that it is. Mr. J. Blatchford held that the provision of the statute, which declares that the judgment of the court on the point shall be final, forbids the reopening of the question at any subsequent stage of the proceeding, unless fraud be alleged and proved. His language is: "Unless this be so, there is no necessary limit to the number of times the court may be required to re-examine the question thus declared to be finally adjudged. I speak now of an allegation merely that the court has erred, and not of an allegation of fraud or bad faith."

In these views I concur. I think the finalty, attributed

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by the act to the judgment of the court, does not mean merely that no appeal shall lie from its judgment, but that the matters so adjudged shall not be thereafter re-examinable even by itself. But I do not consider that Congress meant to deprive the court of its inherent right, where fraud and imposition have been practiced upon it, to apply the remedy. The ground upon which the present motion is based is merely the insufficiency in number and amount of the petitioning creditors. In the brief of counsel fraud and bad faith are charged. There is certainly much color for this accusation. The gross disparity between the aggregate of provable debts due the petitioning creditors, and the total amount of the bankrupt's indebtedness, vehemently suggests the suspicion that both parties must have known that the allegation that they represented one-third of his entire indebtedness was untrue. The creditors could have been at little pains to ascertain the facts if they supposed \$4,292 to be one-third of an indebtedness which twenty days subsequently to the filing of the petition the bankrupt stated under oath to be \$115,062 76.

For some reason the opposing creditors failed to prove their debts before the election of an assignee. The assignee was therefore chosen by the petitioning creditors. He reports that no assets whatever have come into his possession.

The counsel for the petitioning creditors intimate in their brief that the object of the opposing creditors in procuring the adjudication to be set aside, is to obtain the benefit of certain judgment liens on the real estate of the bankrupt. But if so, why has the assignee failed to find the real estate? and why have they failed to point out to the assignee of their own selection assets which it is his duty to collect and distribute amongst all the creditors? The bankrupt, about two years ago, was adjudged bankrupt, but denied his discharge. The debts set forth in his schedule seem to have been contracted since the former adjudication. He claims that the debts from which he then sought to be discharged are barred by the statute of limitations. Under all the circumstances, I think it proper that the opposing creditors

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should have an opportunity to allege and prove, if they can, fraud, bad faith or collusion in obtaining the adjudication.

I therefore deny the motion as it is now made, but leave is given to renew it on the ground of fraud, bad faith or collusion.

THE STEAMER COSTA RICA.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MAY 7, 1876.

1. SALVAGE—TOWAGE.—Ten thousand dollars awarded as salvage compensation.

Before HOFFMAN, District Judge.

W. W. Crane, Jr., and *Jas. T. Boyd*, proctors for libellant.

Delos Lake and *Milton Andros*, proctors for claimant.

HOFFMAN, J. At about one o'clock on the morning of the 26th of October, 1874, the steamer *Costa Rica*, of the burden of about 1475 tons, bound on a voyage from Panama to San Francisco, became suddenly disabled by the breaking of the shaft of her propeller. She was then about one hundred and thirty miles to the southward of San Diego, and about twenty-five miles off shore. Soon after the accident the mate was dispatched in a boat with orders to proceed to San Diego and thence telegraph to the Pacific Mail S. S. Co.'s agents at this port for assistance. At about noon of the same day, and while proceeding on his way, he was overtaken when about four miles from San Diego by the steamship *Newbern*, of about 943 tons and belonging to the libellants. The mate was recognized by the officers of the *Newbern* by the aid of their glasses, and the steamer bore down to his boat and he was invited on board. On being informed of the accident Capt. Metsger, master of the *Newbern*, inquired of the mate if the master of the *Costa Rica* desired to be towed into port, to which the mate replied that he did not know, that his orders were to go to San Diego. He also declined to advise Capt. Metsger to go to the assistance of the *Costa Rica*, telling him that Capt. Nolan intended to work his ship into Cape Colnette. Capt.

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Metzger, however, determined to turn round and see if Capt. Nolan required assistance. This he did at about half past twelve o'clock, and reached the *Costa Rica* about half past four the same afternoon. The distance run back was about twenty-five miles. As soon as the *Newbern* was seen by the *Costa Rica* the sails of the latter vessel were clewed up and furled. When the *Newbern* arrived alongside of the *Costa Rica*, Capt. Nolan was already in his boat and immediately came on board, and a conference took place between the commanders.

Some attempt was made to come to an agreement for a specific sum to be paid for towing the vessel into San Diego, but it was finally agreed that the service should be performed, leaving the compensation to be settled by the two companies in San Francisco. The *Newbern* at once took hold of the *Costa Rica*, and at about nine o'clock on the evening of the succeeding day arrived with her in tow, off the mouth of the harbor of San Diego. As no pilot presented himself the vessels remained outside until about half past seven of the succeeding day, when Captain Metzger determined to enter the port, and at about nine o'clock brought the *Costa Rica* to anchor along the Pacific Mail S. S. Co.'s wharf. He shortly afterwards proceeded on his way to San Francisco, where he arrived at about eight o'clock on the evening of the thirtieth of October. The distance run by the *Newbern*, after turning back, was, as above stated, about twenty-five miles. The distance towed was about one hundred and ten miles. The hawsers used in towing belonged to the *Costa Rica*. The time consumed in the service was about forty and one-half hours, but to this must be added the time employed in running back twenty-five miles, about four hours. But it is to be remembered that the *Newbern*, while towing the *Costa Rica* was still proceeding towards her port of destination, though not by the most direct course, nor at her usual rate of speed. The service was attended by no particular difficulty or danger. The weather was fair and the sea smooth. At the time the *Newbern* took hold of the *Costa Rica* the latter was in no immediate danger. With favorable winds she could probably have reached Cape

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Colnette, where there was safe anchorage, in eighteen or twenty hours, and San Diego in four or five days. But at that season of the year no reliance could reasonably be placed on having favorable winds, or, indeed, any winds at all, and any estimate of the time a vessel so imperfectly rigged for sailing as the *Costa Rica*, with a propeller dragging at her stern, would have taken to reach either of the ports mentioned, is purely conjectural. If a gale had occurred, her propeller, which had been secured by chains passed under it from the stern of the vessel and made fast above, might have been a source of danger. But the probability of encountering gales sufficient to create a sea heavy enough to tear the propeller from its fastenings was remote, and the danger from that source was hardly appreciable. Captain Metzger testifies that when he came down to the *Costa Rica* her ensign was at half mast. Captain Nolan denies that this was done by his orders, if at all. And he states that such a signal would indicate death and not distress, the proper signal in the latter case being an ensign with union down.

The value of the *Costa Rica* was about \$145,000; that of the cargo, including treasure, \$93,000; freight to be earned, \$6,756.64; total, \$244,756.64. The value of the *Newbern* was \$100,000; that of her cargo, \$7,000; treasure on board, \$185,400; total, \$242,000. The value of the coal consumed by the *Newbern*, while performing the service, was about \$800. The case of the *Ellora*, Lushington's R., 550, bears a striking resemblance to the case at bar.

On the eleventh of June, 1862, the *Ellora*, a screw steamer of 1070 tons, belonging to the Peninsula & Oriental Nav. Co., then between Alexandria and Malta, and bound to Malta, Gibraltar and Southampton, carrying passengers and the mail, suddenly lost her screw, which broke off and sunk. By this accident her steam-power became entirely useless. She was in all respects fully equipped as a sailing ship, and she at once made sail. The weather was fine but the wind was light and adverse. Between the time of the accident and the morning of the fourteenth of June, the *Ellora* beat up to the windward 130 miles. The *Junco* then hove in

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sight and, being signalled, bore down to the *Ellora*. The *Juno* was bound with cargo to Hull, and it was agreed between the masters of the two ships that she should tow the *Ellora* to Malta. She thereupon took the latter in tow and on the seventeenth the two vessels reached Malta; the weather being throughout quite moderate. During the passage two outward bound vessels of the Peninsula & Oriental Co. were met and signals exchanged. The *Ellora* was also passed during the passage by another of the company's steamers, then bound from Alexandria to Malta. On the arrival of the *Ellora* at Malta her mails were transferred to the *Juno*, which conveyed them to Southampton and then completed her voyage to Hull. The value of the *Ellora* was in dollars, \$250,000; net passage money, \$2500; mail money, \$4750; total, \$257,250. The value of the *Juno* and her cargo was \$175,000. Dr. Lushington awarded \$6000. It will be noted that the value of the *Ellora*, her passage money, etc., was slightly in excess of that of the *Costa Rica*. The value of the *Juno* and her cargo was less than three-fourths of that of the *Neuborn*. The duration of the service was more than one-third longer than in the case at bar. The *Ellora* was fully equipped as a sailing ship and had proved her qualities as such by beating up 130 miles against light and adverse winds. She was therefore in no greater danger, either immediate or prospective, than any sailing ship under similar circumstances. In both cases aid from other sources was attainable. In that of the *Ellora* from other vessels of the company which met or passed her. In that of the *Costa Rica* from the *Arizona* which had been dispatched to her assistance, and which arrived at San Diego on the morning after the two vessels reached that port. I do not feel bound to strictly adhere to the rate of allowance adopted by Dr. Lushington. The great difference in the cost of coal, labor, etc., the higher rate of interest on capital, the large profits expected and usually obtained from undertakings of all kinds on this coast, justify a higher compensation for services like those in the case at bar, than would be allowed in England.

I shall award the sum of ten thousand dollars.

IN RE THE OREGON BULLETIN PRINTING AND PUBLISHING COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 24, 1876.

1. REVISED STATUTES AND OTHER ACTS PASSED AT SAME SESSION.—The Revised Statutes must be regarded as passed on the first day of December, 1873, and all other acts of the same session of Congress passed that date are to be treated as subsequent acts, repealing the Revised Statutes, so far as they are inconsistent therewith.
2. AMENDATORY BANKRUPT ACT OF 1874 CONSTRUED.—The act of June 22, 1874 (18 Stat. 178), purporting to amend and supplement the Bankrupt Act of 1867 must be regarded as having passed after the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed in the corresponding provisions of the Revised Statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed.
3. CORPORATION—NUMBER OF PETITIONING CREDITORS.—Since the passage of the amendatory and supplemental Bankrupt Act of June 22, 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation, as is required in the case of natural persons.
4. CHARACTER OF CORPORATION ALLEGED.—A petition in bankruptcy against a corporation which does not show that the corporation is either a moneyed, business, or commercial corporation, is insufficient.

Before SAWYER, Circuit Judge.

In September, 1875, certain creditors filed a petition in bankruptcy in the District Court against the Oregon Bulletin Printing and Publishing Company, a corporation organized under the laws of Oregon, in which they alleged that they constituted one-fourth in number of the creditors, and held one-third in amount of the aggregate provable debts of the corporation, the amount due them exceeding four thousand dollars; that within the preceding six months the corporation had committed several acts of bankruptcy,

NOTE.—The main question decided in this case having never been determined by the Supreme Court, those desiring to see the views adverse to those maintained in this opinion, will find them very ably presented in the opinion of Mr. District Judge Deady, in the same case reported in 13 N. B. R. 200.

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for that being insolvent, said corporation made sundry payments to certain creditors named with intent to give such creditors preference; and in another instance procured certain of its property to be taken on legal process with like intent, and praying that for these causes the corporation be adjudged a bankrupt.

The corporation answered the petition, among other things denying that the petitioners constituted one-fourth in number of its creditors, or that they held one-third of its aggregate debts, and filed a separate statement in writing to the same effect.

The petitioners moved to strike out these denials as irrelevant, on the ground that the provisions of section 39 of the Bankrupt Act of 1867, as amended by section 12 of the act of 1874, requiring one-fourth in number of the creditors, representing one-third in amount of the aggregate debts of the bankrupt to join in the petition, do not apply to corporations. The district judge sustained that view, and struck out both the denials of the answer, and the corresponding allegations of the petition relating to the number of creditors and the amount of indebtedness, and adjudged the corporation a bankrupt. The adjudication and rulings were then presented to the Circuit Court for review, both on writ of error and petition for review.

Joseph Simon, for plaintiff in error.

H. Y. Thompson and *Geo. H. Durham*, for defendant in error.

SAWYER, C. J., after stating the facts. The question is, whether under the statute, as it now stands, a corporation can be adjudged a bankrupt upon the petition of a single creditor, or any number less than one-fourth of the whole, and without regard to the amount of the debts.

The district judge, in an elaborate and very able opinion, which merits, and which has received, the most careful and respectful consideration, held the affirmative of the proposition. (13 N. B. Reg. 200.) On the other hand, in *Re Leavenworth Savings Bank*, the district judge of the second dis-

trict of Kansas, adjudged the point the other way; and this ruling was affirmed on a petition for review by Mr. Circuit Judge Dillon in a well-considered opinion, notwithstanding the opinion of the district judge in this case, which was cited at the hearing. (3 Cent. L. Jour. 207.) So far as I am aware, these are the only adjudications directly upon the point, and as there is no authoritative decision upon the question by the Supreme Court, it will be necessary to examine the question anew. Certainly no more important question has arisen under the Bankruptcy Act, and it deserves the most deliberate examination.

The Revised Statutes, which embodied in a different arrangement the provisions of the Bankrupt Act of 1867, and repealed the latter as a separate and independent act, were actually passed on the same day with the act of June 22, 1874, purporting to amend and supplement the act of 1867 so repealed. Which of the two acts passed first in point of time on that day, does not appear. It is necessary, to a proper discussion of the question presented, to ascertain and keep in view the relation of these two statutes to each other. Sec. 5595 provides that, "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three," etc. And the following sections repeal the previous acts. It is plain, that whatever the result, the intent was, in this act to express without change of sense, in a different form and arrangement, all the general statute law of the United States as it existed on December 1, 1873; to substitute this arrangement and expression for prior acts as of that date; and to adopt that date as the dividing line by which its relation to all other legislation subsequent to December 1, should be determined. In accordance with this intention, section 5601 provides that "The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any pro-

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vision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Thus, by express enactment, the revised statutes, for the purpose of determining their relation to other legislation at the same session, are to be regarded as though passed on the first day of December, 1873, and all other acts passed after that date, although in fact passed before the revised statutes, are to be treated and enforced as subsequent statutes, repealing the revised statutes so far as they are inconsistent therewith. Under these provisions, the act of June 22, 1874, purporting to amend and supplement the Bankrupt Act of 1867, must be regarded as passed after the passage of the revised statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act, as carried into and expressed, or in the language of the act: "embraced," in the corresponding sections of the statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. This must be so, for the revised statutes expressly repeal the Bankrupt Act of 1867; and the act of 1874 being construed as subsequent to the revised statutes, on any other hypothesis, so far as it is amendatory of the act of 1867, would simply amend, that is to say: change the reading of certain portions of an act already repealed, and no longer in force, without re-enacting it into a law. The result would be, the amendment only of parts of a repealed statute without re-enacting it into a law, while the corresponding provisions of the revised statutes would remain in force unchanged, except in those parts expressly repealed by section 21 inconsistent with the amendment, and as to those parts so repealed, there would be no statute at all in force. This clearly could not have been the intention of Congress. The amendatory and supplementary act, therefore, must be construed as amending the provisions of the revised statutes, corresponding to, and substituted for, the sections of the act of 1867 purported to be amended in the amendatory act; and the other provisions of said act as supplementing the

provisions of the revised statutes under the title, bankruptcy. Any other construction would result in nothing but the grossest absurdity. So construed, section 12 of the act of 1874 purporting to amend section 39 of the act of 1867, must be construed as amending sections 5021, 5022 and 5023 of the revised statutes.

The decision of the question under consideration, then, must depend upon the construction put upon the revised statutes as thus amended. Section 5122 provides that "the provisions of this title shall apply to all moneyed, business or commercial corporations, and joint stock companies." This provision is comprehensive, and embraces every provision of the title, "bankruptcy," except those which are inconsistent with some express or necessarily implied limitation, or which, from the inherent character of corporations, cannot, in the nature of things, be made applicable; as, for example, a corporation cannot, in the nature of things, be arrested or imprisoned. Section 5023 provides that "an adjudication in bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars." This is one provision of the title, is general and comprehensive, and is applicable to corporations under the provisions cited from section 5122, unless clearly repugnant to some other provision expressly relating to corporations; and there is no such provision, unless it be found in the clause, "or upon the petition of any creditor of such corporation, or company," in section 5122. Are these two provisions necessarily, or by any reasonable construction, upon a consideration of the whole title, and the general policy indicated in it, repugnant? In my apprehension they are not. It must be borne in mind that the principles upon which the act proceeds, and all the details and specific provisions relating to matters of bankruptcy, are prescribed in the other sections; and that the provisions of section 5122, relating to corporations, are intentionally brief, general, and incomplete, specifically providing merely for inherent differences between corporations and natural persons, and referring to the other provisions of the title for

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particulars unaffected by such inherent differences. Thus, it was necessary to indicate in what way the corporate will should be manifested in a voluntary petition, as questions might arise upon this point (and did in fact arise under the act as plain as it seems to be, in *Re Lady Bryan Co.*, 1 Sawyer, 350), and it was accordingly provided that it should be by "petition of any officer of such corporation, or company, duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose." It was not left to the trustees, then, but the interests of the stockholders were "thus carefully guarded by this provision." Having mentioned by whom the petition should be filed in a case of voluntary bankruptcy, it was natural and proper to indicate the party to file the petition in the correlative case of an involuntary bankruptcy, and it accordingly named as the party "any creditor of such corporation or company." In both cases it indicated the person to apply, without either referring to the amount in which the corporation must be indebted to constitute an "act of bankruptcy," or the amount to which the party must be a creditor to entitle him to petition. These were specified in other provisions made applicable by the first clause of the section, and it was not necessary to repeat them here.

So as the officers of a corporation are not the corporation, and it is sometimes necessary to operate upon them in order to reach the corporation, another provision in the section to meet inherent differences between corporations and natural persons, makes certain enumerated provisions of the title applicable to natural persons, also applicable to the officers of the corporation. So, also, as corporations have no need of homesteads, or other property usually necessary to the subsistence and existence of natural persons, who are debtors, and their families, and as its stockholders are also usually personally liable for its debts, it is provided in this section that "no allowance or discharge shall be granted to any corporation," and accordingly that "all its property and assets shall be distributed" as "in the case of natural persons." These are the points of difference briefly indicated, and all other provisions not specifically enumerated, are

expressly made applicable by the comprehensive introductory words of the section. Suppose section 5023 had read: "An adjudication of bankruptcy, either against a natural person or corporation, may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars," section 5122 reading as it does now, "upon the petition of any creditor of such corporation," would these two clauses have been repugnant? Could they not have both stood together, one indicating only the relation of the party to the bankrupt necessary to give him the proper *status*, and the other the amount of the indebtedness which should be requisite to justify troubling the courts and the parties with the proceeding? Could there be any doubt under such provisions of the statute that the creditor or creditors of a corporation must be creditors to the aggregate amount of two hundred and fifty dollars, to entitle them to an adjudication in bankruptcy against the corporation? The question does not appear to me to admit of argument. The provisions would be construed together, and while one provision would authorize a creditor to petition, the other would require him to be a creditor for the amount of at least two hundred and fifty dollars. But the provisions as they now stand in the revised statutes are just as broad and comprehensive. Section 5023 is general and covers every case. The interpolation of the hypothetical phrase, "either against a natural person or a corporation," does not in any degree enlarge the scope of the provision. If the two provisions are not repugnant in the supposed case, they are not so as they are. Besides the provision of section 5023, was a part of section 39, in the act of 1867, which was introduced by the words, "any person," and these provisions had direct reference to the word "person." The provision is, "Any person who, etc., * * * shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," and section 48 provided that the "word 'person' shall also include 'corporation,'" so that under this provision defining the word "person," as used in the act, the

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statute did, in fact, read as though written, "Any person or corporation * * * shall be adjudged a bankrupt on the petition of one or more creditors, the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," exactly, in effect, as I have supposed section 5023 to read in this opinion for the purpose of illustration; and the several provisions of that act must be so read for the purpose of giving a proper construction. So reading it, there can be no doubt that effect can be given to both provisions, and they are not repugnant. But the revised statutes only broke this section up into three sections, without any intention in any way to change the sense. Again, if, under section 5122, a creditor can have a corporation adjudged bankrupt without regard to the amount due him, for the same reason, the corporation may be adjudged bankrupt without being indebted to the amount of three hundred dollars, and without committing any act of bankruptcy as defined in the act at all.

The section says, any officer properly authorized may petition, or that a creditor may petition, without saying that the corporation must be indebted to the amount of \$300, or in any other amount. It does not say that the mere filing of a petition, either by the corporation, or a creditor, shall constitute an act of bankruptcy on the part of a corporation; nor does it say what shall constitute an act of bankruptcy. We must go elsewhere to find what constitutes an act of bankruptcy on the part of a corporation, or else we must imply, that filing a petition by an authorized officer whether there is any indebtedness or not, or the filing of a petition by a creditor to the amount of a dollar is an act of bankruptcy. If we go back to section 5021, we find that a provable indebtedness exceeding the amount of \$300 is an essential element in an act of involuntary bankruptcy; and by section 5014, a like amount of indebtedness is an essential element in an act of voluntary bankruptcy. In the latter case "the filing of such petition" by a person owing the prescribed amount (see first clause) "shall be an act of bankruptcy," (last clause). Unless the provisions of these sections apply, there is nothing prescribing what shall con-

stitute, in either case, an act of bankruptcy on the part of a corporation. If they do apply, then there must be a provable indebtedness to an amount exceeding \$300; for that amount of indebtedness is just as much an element in an act of bankruptcy under those sections, as any other element therein mentioned. Again, under section 5023, (so also, section 39 of the act of 1867) an adjudication might be made "on the petition of one or more creditors the aggregate of whose provable debts amounts to at least \$250, provided such petition is brought within six months after the act of bankruptcy shall have been committed." This proviso is also omitted in section 5122, and the time within which the petition is to be brought is no more part of the "manner provided in respect to debtors," than is the amount of indebtedness due the petitioning creditors, and we have no greater right to incorporate this proviso into section 5122, than we have the other half of the same sentence relating to the amount of \$250. It is all in a single sentence. In the case of a corporation, is there to be no limit as to the time when the proceeding is to be brought? If not, why the distinction? I do not suppose that any one would be bold enough to maintain, that the provisions under consideration would all, or any of them, be inapplicable to partnerships, because in section 5121 the phrase is "or on the petition of any creditor of the parties," without adding the clause to the amount of "at least \$250." Yet these particulars are no more included in the provision of the latter part of the section,—“in all other respects the proceedings against partners shall be conducted in the like manner, as if they had been commenced and prosecuted against one person alone,” than they are in the similar provision in regard to corporations in the next section. I do not perceive why the same reasoning which would make the limitations inapplicable to corporations would not, also, make them inapplicable to partners. Besides section 5122 embraces joint stock companies, as well as corporations, and these, in law, are only partnerships composed of natural persons. Why should there be any distinctions in these particulars between different kinds of partnerships, or be-

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tween natural persons acting alone, or in connection with others in different forms of partnerships?

In my judgment, after a careful consideration of the various provisions of the act, the specific provisions of section 5122, so far as they go, are controlling in respect to corporations; but that all other provisions of the title of an additional character omitted to be mentioned in this section not repugnant to any of its express provisions, and not in the nature of things intrinsically inapplicable are made applicable to corporations by the introductory clause of the section. "The provisions of this title shall apply to all moneyed business or commercial corporations," read in connection with the words of definition in other sections; and that the amount of indebtedness exceeding \$300 dollars, necessary to constitute an act of bankruptcy; the amount, \$250 that must be due to a creditor in order to entitle him to file a petition; and the proviso, as to the time when the petition must be filed in the case of natural persons are all applicable to corporations; that these matters having been provided for by other provisions made applicable by the first clause in section 5122, and other provisions there was no occasion to repeat them in that section, and they were accordingly omitted, with other omitted particulars. But if one of these provisions is inapplicable to corporations all must be, and one creditor, to no matter how small an amount, may control the matter without regard to the interests of other creditors or stockholders, without any limitation as to time when the proceedings, are to be instituted, and in a case where the aggregate indebtedness of the corporation is too insignificant to justify troubling the parties or the courts with the litigation.

Upon the construction adopted, the provisions of the bankrupt act operate uniformly, and are harmonious in all particulars where there are no inherent characteristic differences between corporations and natural persons, and different provisions are made only to meet such differences. This is what we should expect to find in a statute.

If I am right in the construction given to the revised statute unaffected by the amendment of 1874, there can be no

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further difficulty in the case, for the amendment is clearly as broad and comprehensive as the unamended statute. If wrong, the amendment contains inherent evidence either that Congress supposed my construction to be the correct one, and acted upon that view, or else, that it intended the amendment to be broader in its scope, and to include corporations in all its provisions not in the nature of things inapplicable. That the amendment was intended to apply to corporations whatever the proper construction of the former act, to my mind seems clear.

Section 5013 of the revised statutes, like section 48 in the act of 1867, provides that, "In this title the word 'creditor' shall include the plural also; * * * the word 'person' shall also include 'corporation.'" The statute has itself defined the word "person," for the purposes of the act, not for some sections only, but wherever it occurs; and that definition includes "corporation." "Creditor" in section 5122 means also creditors, and "person" in 5021, corporation. Under this definition, we are authorized and required to read the words, "any person," in the amendments of 1874, "any person or corporation." Read in connection with the provisions relating to an act of bankruptcy of the character alleged in the petition in this case, omitting the parts inapplicable, the section as amended in 1874 provides as follows: "Any person or corporation residing and owing debts as aforesaid, who, after the passage of this act, * * * being insolvent * * * shall make any payment * * * of money * * * or procure his property to be taken on legal process with intent to give a preference to one or more of his creditors * * * shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable; *provided*, that such petition is brought within six months after such act of bankruptcy shall have been committed." Reading the section in this way, as we are authorized and required to do,

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the language of the section is not open to any other construction than that which makes the whole applicable to corporations as well as to natural persons. The section is unbroken, and is not divided, and cannot be divided so as to make one part applicable to natural persons only. Either the whole section must be applicable to corporations, or no part of it is, and in the latter case, there is no provision which declares what act of a corporation, or that any act constitutes an act of bankruptcy. The word person in this amendment is not accidentally or inadvertently, but deliberately, brought within the definition of that word as given in section 5013; for in a subsequent part of the same section, Congress, in repeated instances, specifically mentions a class of corporations as being some of the persons embraced in the word person, as used in the introduction of the section. Thus, "that any person * * * who being a bank or banker * * * has fraudulently stopped payment * * * or who being a bank * * * has stopped or suspended, and not resumed payment * * * or who being a bank * * * shall fail," etc., * * * "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable." The words "who" and "bank" refer directly to the word "person" as their antecedent, showing that a bank, at least, was intended to be included in the word "person," and by express provisions, that a bank can only be thrown into bankruptcy on the petition of one-fourth in number of its creditors, who represent one-third in amount of its provable debts. That the word "bank," as used, means, or at least includes, incorporated banks, does not seem to admit of discussion. The term is general, without anything to indicate any limitation on its meaning. It includes all banks of whatever character. It is the very word in universal use when a corporation for banking purposes is intended, and rarely, if ever, used in speaking of a natural

person, the word banker being the more appropriate term, and the one ordinarily used to designate natural persons engaged in banking business. Both terms are used in the statute, showing that Congress intended to include every species of banks. The word "bank" was not used in prior statutes, while banker was, which is all that is necessary to designate natural persons acting as bankers. Showing that in this act, at all events, banking corporations were intended to be included. The word is not used for the purpose of extending the meaning of the word person, but is introduced in defining a particular act of bankruptcy, as though, as a matter of course, a bank was included in the word "person."

It is manifest from this specific recognition of a class of corporations as being some of the persons embraced in the words "any person," in the beginning of this section, that Congress intended to use that word in this section in the broad and comprehensive sense indicated by the definition in section 5013; and used in that sense, there is no escaping the conclusion that the subsequent provision relating to the number of petitioning creditors, and the amount of debts that must be represented by them, are expressly made applicable to corporations. And, again, the section provides, that "the provisions of this section shall apply to all cases," not all cases of natural persons, or all cases other than those of corporations, or to some cases—but to "all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as to those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors" be denied by a debtor, by statement in writing to that effect, require him to file forthwith a full list of his creditors, etc. I am unable to perceive how corporations can, by any reasonable or even possible admissible construction, be excluded from the operation of the clause under consideration. If by expressly defining the terms used so as to

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include corporations, then by expressly naming a class of corporations as embraced within the terms so used and defined; and immediately in connection therewith employing the comprehensive words, "in all cases," which must include cases against corporations as well as natural persons; and further providing in terms without limitation, that "the provisions of this title shall apply to" corporations, Congress does not express an intention to include corporations, it is difficult to see how such an intention could be manifested in any way short of enacting a separate statute relating alone to corporations, which should embrace all the provisions intended to be applicable, without any reference to any other statute or provision relating to natural persons, or other matters.

If I am right in my view of the amendment of 1874, it must prevail, whatever the construction put upon the provisions of previous acts, since it is the last expression of the legislative will, and it repeals all inconsistent provisions wherever found, as well those of section 5122, if those are inconsistent, as of 5021, 5022, and 5023.

In the very able opinion of the district judge, it is said, inadvertently, I think, "the statute provides that a 'person' shall be entitled to a certain allowance out of his property and under certain circumstances to a discharge of his debts. Now, in those two cases the word 'person' does not include a corporation, because the statute, section 5121 revised statutes, expressly provides that no allowance or discharge shall be granted to any corporation," etc. I do not find the word "person" used at all in the statute in the connection here referred to. The "allowance out of his property" is provided for in section 5045 of the revised statutes, and 14 of the act of 1867, and the discharge in revised statutes, section 5114, and 32 of the act of 1867. In all these cases the word used is "bankrupt," and not "person," so that the argument suggested falls with the erroneous hypothesis. I find no instance in the act where the word "person" would not appropriately include a corporation, as the statute says it shall, except one or two where in the nature of things it could not apply, as where an arrest is provided

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for; and no instance in which if construed to include a corporation it would, upon any reasonable construction, make it repugnant to any other provision of the statute. If there is any such instance it has escaped my notice.

It is further said, that the definition of the word "person," in section 5013 of the revised statutes, is limited to the word "person," as used "in this title;" that the amendment of 1874 is an independent act, which is no part of "this title," and therefore, that it does not embrace the word "person," as used in the revised statutes. The title is "Bankruptcy," and in contemplation of the revised statutes at the time of their supposed passage, it embraced all the statute law upon the subject of bankruptcy. In the beginning of this opinion, it is held that the amendatory provisions of the act of 1874, for reasons stated, although referring by name and section to the repealed act of 1867, must be construed as amending the corresponding sections of the revised statutes. Upon this view, the amendatory provisions fall into the place of the sections of the revised statutes amended, as amendments, and thus become a part of the title of the revised statutes amended, and are brought within the operation of the defining section 5013. Section 12 of the act of 1874, revises and embodies the entire subject-matter of sections 5021-22-23 of the revised statutes, and upon well-settled principles of construction takes the place of and repeals all those sections. Besides, section 21 expressly repeals all acts and parts of acts inconsistent with the provisions of the act of 1874. If the amendments do not become a part of the revised statutes, as amendments thereto, they simply amend a repealed statute, which is no longer in force, and the corresponding provisions of the revised statutes being repealed, also, there is no statute in force under which any adjudication in bankruptcy can be had. In my judgment, the amendatory sections fall into the revised statutes and become parts of the title amended.

It seems impossible, by any reasonable construction of the amendment of 1874, to take a bank, though a corporation, out of the operation of the provisions under consideration, yet the creditors of a bank are usually far more

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numerous and more difficult of ascertainment, especially in the case of banks of issue, than those of any other class of corporations. If banks are not excluded from the operation of the provisions relating to the number of creditors and amount of debts represented necessary to entitle them to file a petition, I can see no possible reason for excluding any other class of corporations, and, in my judgment, none are excluded. No distinction between the different classes of corporations is anywhere indicated. If Congress should make any distinction between corporations and natural persons in the particulars in question, we should expect to find some sound and obvious reason for its action. If no sound reason can be found, and the point is doubtful, we ought to conclude that no distinction is intended. No reason has been suggested, and none occurs to me that appears to my mind to be sound. It also appears to me to be a mistaken supposition that a modern corporation is in effect destroyed by an adjudication in bankruptcy, that being stripped of its property it can acquire no more. Such seems not to be the doctrine of the books. (*Miners' Ditch Co. v. Zellerbach*, 37 Cal. 590.) If so destroyed, a corporation created by the act of one sovereignty is annihilated by the act of another sovereignty. In many of the United States, perhaps generally, in respect to recently formed moneyed business and commercial corporations (the class embraced in the bankrupt act), the stockholders are personally liable for the indebtedness of the corporation. The corporation is but an instrument in the hands of the stockholders, and the stockholders themselves, being personally liable, are the ultimate debtors, as well as the parties ultimately enjoying the benefits of the organization. The ultimate effects of an adjudication in bankruptcy against such corporations as to the excess of indebtedness over assets reach natural persons. It may be greatly to the interest not merely of the stockholders, but the great mass of creditors, that there should be no adjudication against the corporation, even though insolvent. It is fair to presume that the stockholders, and three-fourths in number and two-thirds in value of the creditors, will act in such manner as they suppose their

common interests dictate, as well in the case of corporations as where the bankrupt and primary debtor is a natural person; and I can perceive no sound reason why a less number than one-fourth in number and one-third in value of the creditors, should control the proceeding against the wishes and interests of the great majority in one case rather than in the other. The corporation, though insolvent, may repair its capital, and the interests of all concerned may require this to be done. It is in fact sometimes done, as the very remarkable recent instance of the Bank of California, so notorious as to become a part of the public history of the country and of the financial world, shows. The bank stopped payment. Its reputed indebtedness exceeded twenty millions; generally understood to be several millions in excess of its assets. It was therefore largely insolvent. Its capital stock had all been paid up and absorbed. Yet by the forbearance of its creditors and the energy of its stockholders, its capital stock was repaired, as this court had occasion judicially to know, by levying new assessments in pursuance of authority given by the statutes under which it was organized, upon the stock already fully paid up, and its business resumed under such auspices as to give promise of a future no less brilliant than its past. Had it been in the power of a small part of the creditors to have thrown this institution into bankruptcy, and it had been exercised, it would doubtless have severely shaken the finances of the Pacific Coast, if not of the whole country, and have proved a great public calamity. So, also, it is understood that after the sweeping public calamity of the Chicago fire, several of our insurance corporations, whose resources had become largely impaired, repaired their capital in a similar way, and continued on in a prosperous career. These striking examples show that, at least under our system of personal responsibility, corporations as well as individuals have strong recuperative powers, and if not otherwise trammelled than natural persons, may in like manner recover from the effects of extraordinary misfortunes. To my mind, these examples afford a strong argument against any good grounds for a distinction between modern moneyed business and

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commercial corporations and natural persons in the particulars under consideration. The policy of the amendment on this point may be good or bad (with this the courts have nothing to do); but if good for one, it seems to me to be good for both. I am myself unable to find any solid ground for a distinction in this respect between this class of corporations and natural persons, and I am also unable to find anywhere in the statutes the distinction claimed, or any evidence of an intent to make such a distinction.

The case of the *New Lamp Chimney Co. v. The Ansonia Brass and Copper Co.*, 91 U. S. R. 664, has been cited by respondents' counsel as an authority in favor of the views of the district judge, and opposed to the view taken in this opinion, and by Mr. Circuit Judge Dillon in *Re Leavenworth Savings Bank*. There is one clause in the opinion of Mr. Justice Clifford in the enumeration of the points of the provisions of section 37 of the act of 1867, which seems at first view to favor the construction which it is cited to sustain. It is as follows: "Second. The petition for involuntary bankruptcy may be made and presented by any creditor without any specifications as to the number of the creditors or the amount of their debts." This, however, was not a point adjudged, nor did the point arise in the case. There was no question in it as to whether in the case of involuntary bankruptcy of a corporation, a single creditor, without regard to the amount due him, is entitled to file a petition. There is nothing in the case to indicate that this point was either argued by counsel or carefully considered by the court. In illustrating the argument upon the point presented, the learned judge refers to other provisions of the act, and among other things recites the several points as specified in section 37. He nowhere says that the provisions of other sections relating to the amount of indebtedness do not apply to corporations, but only that this section is "without any specification as to the number of the creditors, or of the amount of their debts," which is manifestly true, but without saying what the effect on it of other provisions is. It is quite a different question, whether in determining the right of a creditor to petition, this pro-

vision, simply stating the relation of the party to the corporation necessary to give him the proper status, a right to an adjudication, or simply designating the party, shall be supplemented by the other provisions providing for the required amount of indebtedness, not inconsistent with the clause, so far as it goes, made applicable by other express provisions, and therefore not necessary to be repeated here. Such casual observations in the course of an argument, even where more in point than in this case, are never regarded by the Supreme Court, or the judge who makes them, as authoritative. The reports are full of instances where dicta of a far more pertinent and decided character are wholly disregarded.' I have attempted to show in the first part of this opinion that the other provisions as to amount being additional and not inconsistent are made applicable by the general comprehensive introductory clause of section 37; and by other defining clauses of the act referred to. And this view seems to me to be sustained also by the other observations of Mr. Justice Clifford immediately preceding and following the clause quoted from his opinion. Besides, the learned judge in that same opinion distinctly lays down the rule of construction. We are not to hunt for repugnances, but rather aim to harmonize the various provisions of the act. And there is certainly no repugnancy between the clause in section 37 which named a creditor as the person who is to petition, and the clause in section 39, which fixes the amount for which he must be a creditor to entitle him to petition; and considering both provisions as applicable, harmonizes best with all the provisions of the act, and with the idea of a uniform system, so far as in the nature of things it can be made uniformly applicable. The learned justice in that case found no difficulty in harmonizing provisions far more distinctly repugnant. But it must be borne in mind that the case in the Supreme Court arose under the act of 1867, and the observations of the learned justice were made upon that act as it existed before its amendment. Whatever the proper construction of that act, it does not necessarily control the present act. There seems to be no mistaking the scope of

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the amendment of 1874, and if found inconsistent with anything in section 5122, or elsewhere in the revised statutes, it must prevail, as being the last expression of the legislative will. The case of the *New Lamp Chimney Co. v. The Ansonia Brass and Copper Co.*, was also cited by counsel in the Leavenworth Savings Bank case, and could not, therefore, have been considered by the learned judge who heard it as inconsistent with the construction put by him upon the amendment in question of 1874.

For these reasons, in addition to those expressed by Mr. Circuit Judge Dillon in the case of the Leavenworth Savings Bank, I hold that to authorize an involuntary adjudication in bankruptcy against a corporation under the statute as amended in 1874, the petitioning creditors must constitute one-fourth thereof, at least in number, the aggregate of whose debts provable under the act amount to at least one-third of the debts so provable.

There is no allegation in the petition in this case, that the corporation is either a "a moneyed business or commercial corporation," and the character of the corporation can only be inferred from the name and the averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer. No objection was taken until the issues formed were about to be submitted to the jury, when the point was raised for the first time in the form of an instruction to the jury asked of the court. It was with hesitation denied, on the ground that it came too late. Whether this ruling was correct or not the petition should be amended in this particular.

The adjudication in bankruptcy and the order striking out the allegations in the petition and corresponding denials of the answer relating to the number of petitioning creditors, and amount of debts represented by them, must be reversed and the case remanded for further proceedings, and it is so ordered.

THE 420 MINING CO. v. THE BULLION MINING CO.

CIRCUIT COURT, DISTRICT OF NEVADA.

NOVEMBER 8, 1876.

1. PATENT TO MINING CLAIM—WHO ENTITLED TO.—Under the act of Congress of 1866 (14 Stat. 251) the right to purchase a mining claim to a gold or silver-bearing lode and to receive a patent therefor from the United States, was granted to the person, or association of persons, who, in pursuance of the laws of the State or Territory, and the mining customs, rules and regulations of the place embracing the location, recognized and enforced by the courts, is the owner, and entitled to the possession, as against everybody except the United States.
2. PRE-EMPTION.—The right given is simply a right of purchase, and is in the nature of a pre-emption right, founded upon like principles as the pre-emption laws; and not a right similar or analogous to that of a grantee under an inchoate or imperfect Mexican grant.
3. DEFENSES IN ABATEMENT AND ON MERITS.—Under the statute of Nevada authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be *res adjudicata*, and the parties will be estopped from further litigating the merits, even though the issue upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue.
4. SAME.—In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue, and in fact found by the court in favor of the defendant.
5. SEVERAL DEFENSES IN SAME ANSWER.—Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses, and where all are in fact determined, the determination as to all will be conclusive between the parties.
6. ESTOPPELS MUTUAL.—When the findings and judgment in a given case are conclusive on both parties if conclusive on one, the estoppel is mutual within the meaning of the rule requiring estoppels to be mutual.
7. JUDGMENT TECHNICALLY CORRECT REVERSED.—Where a judgment is broader in its scope, and more advantageous to a party than he is entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct.

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8. SAME.—A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record.
9. PARTIAL NEW TRIAL.—A new trial may be granted, under the practice in Nevada, upon some issues without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment. The judgment in such case may be reversed, modified or affirmed, as justice may require; but there would be no estoppel as to the matter embraced in the finding vacated.
10. STATUTES OF LIMITATIONS AND MINING CLAIMS.—The statute of limitations of Nevada relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined for the purpose of ascertaining who is entitled to purchase a part of a mineral lode under the act of July 26, 1866.
11. PAROL PARTITION.—A parol partition executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which possession and partition are acquiesced in by the parties is valid; and upon such a partition the parties cease to be tenants in common.
12. TENANTS IN COMMON OUSTER.—One tenant in common may oust his co-tenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession, they deal at arms-length, and there is no longer any relation of trust or confidence between them.
13. TITLE UNDER STATUTES OF LIMITATIONS.—Adverse possession for the time limited by statutes of limitations not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder.
14. SAME TITLE QUIETED.—A title acquired under a statute of limitations will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred.

Before SAWYER, Circuit Judge.

Demurrer to bill in equity.

The facts as alleged in the bill are as follows: On June 23, 1859, John Cosser and Walter Cosser, under the firm name of Cosser & Co., J. Morris, J. Durgan, Thomas Winters, V. A. Houseworth, C. True, J. Powell and A. Ricard located and appropriated, in the manner prescribed by the mining rules on the Comstock lode, a mining claim of 1600 feet in length on the lode; took possession of the same, and thereby, as tenants in common, became the owners of said claim, as against all the world, except the

United States. In July, 1859, the said parties, while still in possession, by a verbal agreement, to which all assented, agreed that said mining claim should be segregated into two parts, and that said Durgan, Morris, Powell, Ricard and True should thenceforth, as tenants in common own and possess exclusively the portion of said claim and lode extending from its northern boundary southerly a distance of 420 feet, and should release all their interest in the other portion of said claim and lode to said Winters, Crosser & Co. and Houseworth, who should own and possess, in the same manner, said southern portion of said claim and lode, and release to said first-named parties all their interest in said northern portion of 420 feet. In pursuance of said agreement a monument was placed to mark the division line and the parties took possession of their respective portions, Durgan and his associates taking possession of the northern part, and Winters and his associates of the southern part, and thenceforth each of said parties and their successors in interest exclusively held possession and improved the part so allotted to them, in accordance with the mining rules and regulations, and claimed no interest in the other portions of said claim or lode. No written conveyance was ever made in pursuance of said agreement, and no demand for one was ever made, except the demand for the purposes of this action. All the right, title and interest of said Durgan and his associates in said north 420 feet of said lode were subsequently, by sundry mesne conveyances conveyed to the complainant, a corporation organized under the laws of Nevada. Between the segregation, as aforesaid, and January 1, 1864, said Durgan and associates had spent in prospecting and developing said mine not less than \$30,000, and since the latter date the 420 Mining Company have for like purposes spent an additional sum of \$30,000. The Bullion Mining Company, a corporation organized under the laws of California, has since acquired all the right, title and interest of said Winters and his associates in the southern portion of said lode, and has since held the same in accordance with the mining rules and regulations. On November 16, 1868, the Bullion

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Mining Company commenced an action in the proper court against the 420 Mining Company, to recover said northern 420 feet of said lode, alleging title in plaintiff, and wrongful possession and withholding by defendant. Defendant answered, admitting possession by defendant, but denying that the possession was wrongful. This action was voluntarily dismissed on plaintiff's motion without trial, on June 3, 1872, without notice to the defendant to the action. On November 6, 1868, while the 420 Mining Company is alleged to have been in possession of said northern 420 feet of said lode, the Bullion Mining Company applied at the proper land office for a patent, embracing the whole of said claim, both the southern part and said northern 420 feet conveyed to the 420 Mining Company, being the part now in controversy, under the acts of Congress, entitled, "An Act to grant the right of way to ditch and canal-owners and for other purposes," approved July 26, 1866, and in pursuance of such application a patent embracing the whole of said claim on the Comstock lode was issued in due form to said Bullion Mining Company on March 26, 1875. It is alleged in the bill that the said application for a patent was based solely on the said location, made June 23, 1859, and that the only pretense of title to said part in controversy is a conveyance to the Bullion Mining Company of their interest therein by said Durgan and his associates, made subsequently to the said conveyance by the same parties to the 420 Mining Company, with a knowledge at the time on the part of the Bullion Mining Company, of the prior conveyance to the 420 Mining Company.

On November 30, 1872, the 420 Mining Company commenced an action in the proper court in the State of Nevada against the Bullion Mining Company, to determine the adverse right of the latter company to said 420 feet of said lode, which action was duly tried and a judgment therein duly entered, and a copy of the record in that suit is annexed to, and made a part of, the bill of complaint in the present action.

It is further alleged that by reason of the issue of the patent, as aforesaid, the legal title to said northern 420

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feet of said lode became wrongfully vested in the defendant; but, that by reason of the facts alleged, the complainant was really the owner of said 420 feet of mining ground, and entitled under said act of Congress to the patent therefor. The bill thereupon prays that the complainant be decreed to be entitled to said mining ground; that the defendant holds the legal title in trust for complainant, and that it may be required to convey said 420 feet of said lode to complainant:

The complaint in the record of the said action of the 420 Mining Company against the Bullion Mining Company commenced November 29, 1872, to determine the adverse claim of the latter, attached to and made a part of the bill, alleges that the 420 Mining Company, complainant therein, is "the owner of, in possession of, and entitled to the possession of," the said 420 feet of the Comstock lode now in controversy; that the Bullion Mining Company, defendant therein, "claims an estate or interest therein adverse to the plaintiff," and denies the validity of such adverse claim. It then sets out the commencement of the said former action by defendant against complainant to recover possession of said 420 feet; the answer of defendant denying the right; the application of defendant in this action for a patent; the filing of protest by complainant; the subsequent dismissal of the action to recover possession by complainant in that action (defendant in this) without notice to the defendant therein that the right has never been determined between the parties; and praying that the Bullion Mining Company, defendant, may be required to set forth its claim; that the rights of the parties be determined by the court, and that the defendant, the Bullion Mining Company, be adjudged not to have any estate or interest in said mining ground, etc. The answer to said complaint denies the ownership of the complainant, its right of possession and its actual possession of said 420 feet, or any part thereof, at the time of the commencement of the action. It denies that the defendant's claim is without right, and then affirmatively avers that "at the date of the commencement of this action, and for a long time prior thereto, it was and still is the

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owner of, and in possession of, and entitled to the possession of, said mining ground, ledge, or lode, and every part thereof." It then alleges affirmatively, in appropriate terms, an adverse possession in the defendant of the said 420 feet of the Comstock lode for a period exceeding the time required to give a title under the statute of limitations of Nevada in cases of mining claims; and that during all of said time the defendant had held and worked such claim in the manner required by the laws and customs in force in the district in respect to such claim; and then also avers affirmatively that neither the claimant nor any person under whom it holds had been seised or possessed of said 420 feet, or any part therein, within the period prescribed by the statute of limitations applicable to such cases; and further, that the alleged cause of action had not accrued within a period of four years. Upon the trial of the issues, the court found the facts to be as follows:

"1. That the plaintiff was incorporated in the State of California, on the twenty-third day of June, A.D. 1863.

"2. That the trust deeds were executed to the 420 Mining Company, located in the Virginia mining district, county of Storey, Territory of Nevada, the first bearing date September 30, 1863, and the second July 5, 1864, and each conveys all the right, title and interest of the parties therein named, as grantors of, in and to that certain mining ground known as the mining ground of the 420 Mining Company. No other description of the ground is given, and no title in either of the grantors to the mining ground in dispute in this action was shown.

"3. That sometime in the fall of 1859, a shaft was commenced on the northern end of the ground in dispute in this action, by some persons, claiming to represent a company called the 420 Company, and thereafter, down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 Company. That no further work for any company of that name is shown to have been done until some time in the year 1865, when some persons commenced work in a shaft on said ground,

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claiming to work for the 420 Company, and continued there for a short time, until ejected by the employees of the defendant, as hereafter stated.

"4. That on the sixteenth day of November, 1865, the defendant in this action filed a complaint in this court against the plaintiff, alleging that it was the owner of the ground in dispute in this action, and that the defendant had entered upon and taken possession of and ousted the plaintiff from said mining ground now in dispute, and was still in possession thereof, holding adversely to the plaintiff, the Bullion Mining Company. Said complaint was sworn to by George W. Hopkins, secretary of said Bullion Mining Company. To that complaint the defendant, the 420 Mining Company, this plaintiff, filed an answer denying specifically each allegation of the complaint, and the same was sworn to by C. J. Lansing, its attorney in the case. Said action was pending untried until the — day of —, 1872, when it was dismissed, on motion of the plaintiff therein.

"5. There was no evidence showing that any location of the mining ground in dispute in this action had ever been made by the plaintiff, or any person or persons through whom it claims.

"6. The defendant proved that it claimed under two locations of the ground and claim in dispute in this action. The two claims were united early in 1863, under the name of the Bullion Company, and on the eighteenth day of February, A.D. 1863, a trust deed, in which some of the original locators in each of said locations joined, was executed by various persons which conveyed, in terms, to this defendant, mining ground which embraces all the grounds in dispute in this action.

"7. In August, 1860, persons commenced work on the mining ground described in finding six, under the locations therein mentioned, and continued work until the conveyance made to the defendant, as aforesaid; and defendant has continued to work thereon day and night, from that time to within a few months past, all the time claiming title to all of said mining grounds, including said ground in dispute.

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"8. On the seventh day of June, 1866, defendant received from one G. W. Birdsall, a deed of a mining claim, embracing the mining ground in dispute in this action. No title thereto was shown in said Birdsall, but defendant claimed title under that deed and the trust deed aforesaid.

"9. That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action the persons mentioned in finding three as working thereon for the 420 Company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to plaintiff."

"As a conclusion of law, I find that the defendant is entitled to judgment as prayed in the answer, and order accordingly."

Thereupon the following judgment or decree was entered:

"This cause came on regularly for trial on the fifteenth day of August, A.D. 1873, and by oral consent, given in open court, a jury was waived, and the trial had by the court, and the court having heard the evidence, and the cause being subsequently submitted, the judge, this day filed his findings of fact herein in favor of the defendant. Thereupon it was ordered by the court that judgment be accordingly entered for the defendant. Wherefore, it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in its complaint, and that it take nothing by its action. It is further adjudged that the defendant have and recover of the plaintiff its costs of suit, taxed at \$155.05."

"Judgment filed August 21, 1873."

The following are the provisions of the acts of Congress construed by the court:

Section one of the act of July 20, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," declares "mineral lands on the public domain to be free and open to exploration and occupation by all citizens of the United States," * * *

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"subject to such regulation as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." Section two provides that "whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same are situated, and having expended in actual labor and improvements thereon an amount of not less than \$1,000, and in regard to whose possession there is no controversy or opposing claim, it shall, and may be lawful for such claimant, or association of claimants, to file in the local land office a diagram of the same so extended laterally or otherwise, as to conform to the local laws, customs and usages of miners, and to enter such tract, and receive a patent therefor granting such mine," etc.

Section three provides "that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey and description, and a patent shall issue for the same therefor."

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Section six provides as follows: "That whenever any adverse claimant to any mine located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases."

Section nine makes similar provision for confirming water rights under like circumstances; that is to say, "whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing and other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected therein." On July 9, 1870, six sections were added to the act and were thenceforth to form a part of it. Similar rights under section twelve (section 1 of the new act) were extended to the possessors of placer claims; and section thirteen provided that "where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim."

In 1872 a new act was passed as a substitute for much of the former acts, making still more specific provisions as to the mode of proceedings, etc., but providing that the repeal of portions of former acts should not affect rights already vested thereunder, and that proceedings to perfect such vested rights might be had in pursuance of the provisions of the new act.

C. J. Hillyer, Delos Lake and R. S. Mesick, for complainant.

M. N. Stone, John Garber and R. H. Lloyd, for defendants.

SAWYER, Circuit Judge, after stating the facts. Upon the facts shown by the bill of complaint, the defendant insists that the right to the four hundred and twenty feet of the Comstock lode in question, and, consequently, the right to the patent, appears in the bill to have been once directly put in issue, in an action between the same parties fully litigated and determined in favor of the defendant; and that the matter is *res adjudicata*, and a bar to further litigation. On this ground it is claimed that the bill shows no equity. After a careful consideration of the acts of Congress set out in the statement of the case, it is clear to my mind, that it was the intention of Congress to give the right of purchase of a mining claim, to a silver or gold bearing lode or vein, to the person or association of persons who, in pursuance of the laws of the State or Territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the government of the United States. It will be seen that the act expressly refers to, and recognizes, the laws of the State or Territory, the local customs, rules and regulations not in conflict with the laws of the United States, the decisions of the courts, and even, in express terms, the States and Territorial statutes of limitation applicable to the subject. The act requires the party seeking a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land office, also, to publish a notice of the same in a newspaper published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed "until final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases." That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs, and laws of the locality. It seems impossible to come to any other conclusion, than that the party, who at the time

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can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Congress intended to confer the right to purchase, no matter how that right originated, if under such laws and customs and decisions of the courts he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy. And what this privilege is, is stated in the case of *Hutton v. Frisbie*, 37 Cal. 479, and *Frisby v. Whitney*, 9 Wall. 191. The case is in no wise like the case of an inchoate, imperfect Spanish grant, but is in all respects like a case under the pre-emption laws. The object of a determination of the right by litigation where there is an adverse claim, is simply to ascertain the party who has the right to the claim under the laws of the State and local rules and customs; for that person, when found, is the party upon whom the law confers the privilege—the right to purchase. There is no bounty about it, for the party must pay for the land five dollars per acre and the cost of survey, which is more than double the price of ordinary public lands. Undoubtedly the price is often far less than the real value, and so it often is in ordinary pre-emption cases; but this fact in no way affects the principle upon which the law proceeds. Doubtless the object of conferring the privilege is to encourage exploration of hidden mines, as the privilege in ordinary cases of pre-emption is to encourage settlement and cultivation of the public lands, for the purpose of developing the resources, and contributing to the general prosperity of the country.

If I am right in this view—and it really does not seem open to serious argument—then, in order to ascertain which party was entitled to a patent, it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and the decisions of the courts in force at the time in the locality embracing it without regard to the act of Congress; for the

act of Congress remits the parties to these laws, rules and customs solely to determine their rights.

The next question is, whether it appears, upon the averments of the bill, that the title to the mining claim in dispute, under the local laws and customs upon which it depends, has been once directly put in issue between the parties, and tried and determined in such manner as to become *res adjudicata*. If so, it ends the case. If not, it will be necessary to consider the other questions raised by the demurrer. After a thorough consideration of the question, I am unable to resist the conclusion that the title has been so put in issue, tried and determined as to become *res adjudicata*, and a bar to further litigation. That it was put in issue, and the facts found, there can be no doubt; and I do not understand that this proposition is controverted. But it is insisted that there was another issue, also found for defendants, upon which the judgment might have been rested, and still be correct; and that there was no occasion to pass upon the title, and no authority in the court to pass upon it; or if there was authority so to do, that it does not appear affirmatively that the judgment went upon that ground, and consequently there is no estoppel. The statute of Nevada, at the time of the commencement of the action, the record of which is made part of the bill, authorized a party in possession of land or of a mining claim to bring an action against any adverse claimant to determine his adverse claim. As that is the most favorable view for complainant, I shall assume, what the defendant denies, that the action in question was brought under, and depended upon, that provision of the statute; and that in case of a failure to prove possession at the time of the commencement of the action, the suit would necessarily fail on that ground, if on no other. The want of possession is not, strictly speaking, jurisdictional, for the court has jurisdiction to consider and determine the subject-matter. It is a technical dilatory objection in the nature of matter in abatement. It simply defeats the present action, without regard to the merits. The party out of possession, upon this view, must first bring his action to get into possession; but this would not be a

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complete remedy against a party claiming title adversely. A recovery of possession might be had and the defendant still set up his claim, and make it necessary for the successful party to bring another suit to determine his adverse claim, and injoin his silence, even though the first judgment might be conclusive evidence of his right on the trial of the second action. Having recovered possession, he would then be in a position to maintain his further action to obtain a complete remedy. If he brings his action to determine an adverse claim while out of possession the most that can be said is, that his action is prematurely brought, and on this appearing it would be dismissed, as it would be one valid ground of defense to this particular action. The statute has since been amended, both in Nevada and California—and in Nevada the act passed pending this action—so that a party out of possession can now, at least, maintain the action. But conceding a want of possession at the commencement of the action to be one good defense, there may be several other good defenses, and section 1112 of the Compiled Laws of Nevada provides, that “The defendant may set forth by his answer as many defenses and counter-claims as he has. They shall each be separately stated,” etc. Thus all defenses, whether dilatory or to the merits, may be set up in the same answer and tried together. If it is admissible to set up several defenses in one answer, it must be competent for the court to try and determine them all. The law neither enjoins nor permits a vain thing to be done. But it would be doing a vain thing to set up a defense which could not be tried when set up.

It may not be necessary to dispose of all the issues, and sometimes, doubtless, all are not determined; but it is certainly admissible to do so, and if properly tried and determined, I can see no good reason for not holding every issue so properly in fact tried and determined, to be finally and conclusively determined. Suppose the judge should be entirely satisfied that defendant's title is good, and so find distinctly, on that issue, without passing at all upon the issue as to whether defendant was in possession at the commencement of the action, either because the evidence

on that point left it in doubt, or because, for any reason, he preferred to rest his judgment on the defendant's title—on the real merits of the case—can there be any doubt that the matter would be *res adjudicata*? If he is authorized to find the issue, without passing upon the other issue, and his determination would be *res adjudicata*, he is certainly authorized to pass upon it in connection with the other issue, and if so determined, it must have the same force as a determination in the other mode. The question must be: "Was the issue in fact determined?" In the case before tried, the complaint of plaintiff alleged title in itself, possession at the commencement of the action, and an adverse claim on the part of the defendant, together with other matters. The defendant took issue directly on the allegation of title, and on the allegation of possession in plaintiff at the commencement of the action, but admitted making an adverse claim. Another answer, then, affirmatively alleged title in defendant itself, and as affirmative matter, also, directly alleged, in apt and proper form, an adverse possession during the period prescribed by the statute of limitations of Nevada, applicable to the subject. Thus the title of the plaintiff, his possession at the commencement of the suit, and the adverse possession of the defendant for the period prescribed by the statute of limitations to bar the action and vest the title in defendants, were each directly in issue, and each issue was in fact submitted by the parties and tried by the court without a jury. A special finding was filed, from which it appears exactly what was found, and, manifestly, all these three issues were found against the plaintiff. The court did not, in so many words, say in its finding that the plaintiff had no title, or, in so many words, that the plaintiff was not in possession at the time of the commencement of the action, but it found facts which necessarily showed that plaintiff had no title, and that defendant had title; and it found in express terms, in so many words: "That the agents of defendants, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding three, as working thereon for the 420 Company, and from that time until the

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commencement of this action, and until the trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to the plaintiff."

From the finding of the fact of adverse possession of defendant since 1865 it inferentially or argumentatively appears that the plaintiff could not have been in possession at the time of the commencement of the action. The court adds, as a conclusion of law, that the defendant is entitled to judgment, as prayed in the answer, and orders judgment accordingly. Upon these findings a judgment for the defendant, in the usual and proper form of a judgment on the merits, was entered, wherein, after reciting the filing by the judge of "his findings of the facts herein in favor of the defendant," "it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in the complaint, and that it take nothing by its action," and adjudged costs. This is certainly an appropriate judgment upon the finding on the issue as to adverse possession, and more appropriate to this issue than upon a finding merely against possession in the plaintiff at the time of the commencement of the action. It is not a judgment of nonsuit, or a judgment in form upon a plea in abatement, or a judgment in any manner without prejudice, but apparently and in form a judgment on the merits. As a matter of construction of the findings, and judgment, I also think it manifest that the judgment was intended by the judge to be based, and that it is based, upon the finding of adverse possession in the defendant for a period prescribed by the statute of limitations for barring the action and vesting title in the defendant, and on title in the defendant. The judge finds in express terms on that issue, and makes it the prominent finding in the case; while he does not find expressly on the issue as to the possession of plaintiffs at the commencement of the suit, but omits to say anything about that distinct issue presented on the allegation of the complaint.

It is only inferentially and argumentatively that we ascertain the fact of want of possession of the plaintiff at the

commencement of the suit, from the finding of adverse possession in the defendants for a period covering the date of the commencement of the suit, on the affirmative issue tendered by the defendant in setting up the statute of limitation. It is evident from this, and from the fact that the judgment is appropriate to the finding, that the judge proceeded especially upon this finding in adjudging the matter in controversy—that he intended to put his judgment upon the merits of the case and not upon the matter of abatement—or matter not touching the merits, which only defeated the present action. Suppose this ninth finding had been omitted, there would be no finding at all upon the issue as to whether the plaintiff was in possession at the commencement of the action. Or, suppose, on appeal from an order denying a motion for a new trial, the Supreme Court had reversed the order as to the ninth issue only, finding adverse possession for the period specified, on the ground that it was not supported by the evidence, there would be no other finding showing that the plaintiff was not in possession at the time of the commencement of the action, upon which the judgment could be sustained. The Supreme Court of Nevada, under the practice that prevails in that state, only exercises appellate jurisdiction. It could not set aside a verdict on the issue as to adverse possession, and itself investigate the question anew, and make for itself another finding that plaintiffs were not in possession at a particular date—the date of the commencement of the suit—and on its own finding sustain the judgment. *Non constat*, that the court below would find on the evidence that there was no possession at that date, if the evidence was insufficient to show an adverse possession for the whole period found. The Supreme Court would, upon vacating the ninth finding, necessarily remand the case for a new trial on these issues. Had there been a tenth finding, that the plaintiff was not in possession at the time of the commencement of the action, the judgment might be sustained on that finding, upon the hypothesis I have assumed for the purpose of the argument, even upon a reversal of the ninth finding. Thus it appears that the judgment of the court must rest upon the ninth

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finding, which was, evidently intended to be, and is, a finding on the issue of adverse possession, and only inferentially and argumentatively shows that it includes the time at which the suit commenced, but is not an express finding on that issue. The two issues are not the same, not identical, for one is broader and includes more than the other. The court found the larger issue, which, of course, includes the smaller, and the judgment is rested on the issue as found, and not upon issues not mentioned at all in the finding, and which are only worked out by inference. As a matter of construction, then, I hold that the record shows upon its face that the question of adverse possession, and, consequently, of title in the defendants, was put directly in issue, litigated and found for the defendants, and that the judgment entered is rested on that finding. But if there had been another distinct, express finding that the plaintiff was not in possession at the time of the commencement of the action, the other findings and the judgment being precisely as they now are, I still hold that the matter would be *res adjudicata*. As before stated, the statute of Nevada authorized the defendant to plead as many defenses as he had. He did plead several, each of which, if sustained, is good. All were tried and submitted, and the issues on the merits were expressly found in a special verdict showing that they were determined and the judgment is appropriate to the issues on the merits, and sanctions and concludes the findings which after judgment are no more open to question except on appeal. So are the authorities under the same system of practice as that which prevails in Nevada, and I have found none to the contrary. *Sheldon v. Edwards*, 35 N. Y. 286, is exactly in point on this proposition and on the last, but by no means so strong a case on the last proposition as is the case now under consideration. *Clink v. Thurston*, 47 Cal. 30, and *Munson v. Munson*, 30 Conn. 426, 433-4, are also in point; although the latter is under a system of practice different from that which prevails in Nevada. (See, also, on the more general question, *Low v. Massey*, 41 Vt. 394; *White v. Simons*, 33 Vt. 178; *Farmer's &c. v. Brownson*, 14 Mich. 371; *Bissell v. Kellogg*, 60 Barb. 627; *Amory v. Amory*, 26

Wis. 151; *Felter v. Millenir*, 2 John. 181; *Rockwell v. Langley*, 19 Penn. 502; *Doy v. Valletto*, 25 Ind. 42.)

But the law as stated in a recent decision of the Supreme Court of the United States is also in point, and if it be correct must be conclusive. In *House v. Mullen*, 22 Wall. 42, there was a demurrer to the bill on four distinct specified grounds, of which the first was misjoinder of the parties; and the fourth, that the claim is stale and barred by the statute of limitations, etc. The decree is, "that it is considered by the court that the said demurrer of the defendants be sustained. It is therefore adjudged and decreed that the said bill of complaint of Eliza House, Mary Hunter and Charles Hunter be, and the same is, hereby dismissed out of this court." On appeal, the Supreme Court hold that the second, third and fourth grounds of the demurrer are untenable, and in those particulars the bill is good; but that the bill is bad on the first ground for misjoinder of parties, and that the "demurrer therefore was properly sustained and the bill dismissed." (Id. 46.) But, says the court, the record does not show that the bill was dismissed for misjoinder of parties, and it is not dismissed "without prejudice." "There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit: staleness of the claim, statute of limitations, and long acquiescence in the possession and claim of title by the defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was dismissed, or on what ground it was dismissed. As the record stands, this decree might be pleaded successfully as a bar to any other suit brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice, or had stated as the ground of dismissal the misjoinder of the parties, or the want of interest in two of them, we would have affirmed it; but to prevent a great injustice we must reverse the present decree and

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remand the case," etc. Thus on the ground alone that the decree in the form rendered would be a bar to another action, on points that ought not to be concluded it was reversed, although there was no technical error. Upon the doctrine of that case there is no escaping the conclusion that the former judgment between the parties in this action is conclusive; for it is a much stronger case for the application of the doctrine than the one cited. In the former action between these parties, the issues were made, submitted, tried, and found by the judge in favor of the defendant in such manner as to show the exact issues found, and a judgment upon the findings entered, such as should be entered on the merits, a judgment in form upon the merits, and not in terms a mere "dismissal out of this court," as in the case of *House v. Mullen*. This, therefore, must be regarded as a judgment rendered on the merits. (See, also, *Durant v. Essex Company*, 7 Wall. 109.) There was, in fact, an appeal in the former action, and counsel on both sides have referred to the opinion of the Supreme Court of Nevada on the appeal. (9 Nev. 248.) It is manifest that the Supreme Court also regarded the judgment as having been rendered on the merits, and affirmed it on the ground that the action was barred by the statute of limitations. In the case of *Aurora City v. West*, the Supreme Court also says: "The better opinion is that the estoppel, when the judgment is on the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceeding." (7 Wall. 103.) And Mr. Justice Miller, who alone dissented, stated the rule to be that "when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." (Id. 106.) The case under consideration is, in my judgment, clearly within the very restricted doctrine as stated by Mr. Justice Miller; for it appears by the record itself what issues were submitted, and what issues of fact were in fact found, at least,

so far as the defense and title founded upon the statute of limitations are concerned.

The discussions in the courts have heretofore mostly arisen upon general verdicts where it could not be known from the verdict and pleadings upon what particular issues the jury passed. In such cases, some authorities hold that the party relying on the estoppel must show by extrinsic evidence what issues of fact were determined, and this is the view which Mr. Justice Miller seems to hold in the dissenting opinion cited. Other, and apparently a majority of, cases hold that a general verdict is itself *prima facie* evidence that all the issues of fact were determined, and that the party seeking to avoid the estoppel must show by extrinsic evidence what points in issue were not in fact determined by the jury; and the Supreme Court seems to go to this extent at least. But no such question can arise on special findings like those in this case where the record itself shows the exact issues found by the judge. The authorities cited by complainant's counsel relate to general verdicts, and are therefore inapplicable.

It is urged that upon the findings there is no estoppel, because the estoppel is not mutual, for the reason that, if certain findings had been the other way, it would not have been conclusive on both. It is not necessary to inquire what might have been the effect, had the findings and judgment been different. The question is, what is the effect upon both parties of the findings and judgment under consideration, not what the effect of some other findings and judgment might be. Are these findings and judgment conclusive on both parties, if conclusive on one? If so, the estoppel is mutual within the meaning of the rule. This point is also judicially determined in *Sheldon v. Edwards*, 35 N. Y. 288, before cited. There can be no doubt, I think, that in this case both parties are concluded if either is, and the estoppel is therefore mutual within the rule.

It is further argued, that if this adjudication is conclusive it might result in injustice to the complainant; for, if on appeal, the Supreme Court should come to the conclusion that the finding upon the issue of the statute of limitation

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was not supported by the evidence, the judgment could not be reversed, because it is still right on the issue that the plaintiff was not in possession, and the court could not disturb a judgment which is not erroneous. We have already seen that the Supreme Court of the United States, in *House v. Mullen*, did reverse the judgment where there was no technical error—where the judgment was not erroneous in the sense in which counsel use the term for the purposes of this argument—and on the sole ground that all the points covered by it would be *res adjudicated* and operate as an estoppel, whereas it appeared to the court that some of the points ought not to be considered as finally determined, which upon the record as presented would be concluded. This reversal, doubtless, proceeded upon the idea that the judgment was broader in its scope and more advantageous to the plaintiff than he was entitled upon the record to have it. So in this case, if the defendant in the former action obtained a judgment covering the entire merits when, in fact, either upon the issues found or upon the issues correctly found, after determination of the appellate court, that other issues were improperly found, he ought only to have had judgment of nonsuit or dismissal without prejudice, the appellate court would undoubtedly have reversed or modified the judgment, and the latter might be done under the practice in Nevada. This would certainly be doing no vain thing, as insisted by counsel, but doing what a party would be legally entitled to claim at the hands of the court. The court would have no discretion to allow a judgment to stand which would conclude a further litigation of issues, that they were satisfied from the record ought not to be concluded, simply because the judgment in its present form might, also, give proper effect to the determination of other issues properly determined.

Under the system of practice in Nevada at the time, there were two appeals allowed, one from the judgment and one from an order granting or denying a motion for new trial, wholly independent of each other, and which might be taken separately or together, and upon either of which the judgment in a proper case might be modified or reversed.

Upon an appeal from a judgment, only questions of law affecting the validity of the judgment could be considered. The facts could not be reviewed. If a party desired to have the facts reviewed, it was necessary to move for a new trial, and to prepare a statement as the basis of the motion, specifying the precise issues, or points upon which the evidence was insufficient to sustain the verdict or finding, and to insert all the evidence bearing upon that precise point, and no more. Upon a denial of the motion for new trial, the party had his appeal; and the statement for new trial constituted the record upon which the appeal on the points specified was heard. Should the verdict or findings be found to be unsupported by the evidence wholly, or in part, it might wholly, or to the extent found erroneous, be set aside. If the finding set aside is material to support the judgment, the judgment would necessarily be reversed. But if the other findings, not disturbed, are still sufficient to sustain the judgment, the judgment would not, necessarily, be reversed, but it, doubtless, might be. If not reversed, the vacating of the findings on some of the issues not necessary to sustain it, would take those issues out of the operation of the rule relating to *res adjudicata*, because they would appear not to have been determined. Thus, in the case in hand, suppose there had been another express finding, that the plaintiff in the former action was not in possession at the commencement of the action, and on motion for new trial, or on appeal from the order denying a new trial, the court should be satisfied that the finding as to the adverse possession was not supported by the evidence, but that the finding of want of possession at the commencement of the action was correct, the finding on the issue as to adverse possession could be set aside without disturbing the other findings. But the judgment, if correct, on the remaining issues need not be disturbed, or, if too broad in its scope, it could be modified and properly limited. Thus the rights of the parties could and would be protected. New trials as to some particular issues were often granted, even under the old system of practice, without disturbing the verdict or findings on other issues. (*Wiggins v. Smith*,

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54 N. H. 213, 223-4; *Robinson v. Townshend*, 20 Pic. 351; *Winn v. Columbian Insurance Co.*, 12 Pic. 288; *Hutchinson v. Piper*, 4 Taunt. 555.) The practice in California and Nevada affords still greater facilities for pursuing this course, as is sometimes done. (*Argenti v. City of San Francisco*, 30 Cal. 403.) Doubtless, if it was more frequently done, it would greatly redound to the advantage of the parties, and conduce to the administration of justice.

But in this case, if the finding upon adverse possession should be set aside, as we have seen, there would be no finding at all on the issue as to plaintiff's possession at the commencement of the action, as that fact is only inferred from the finding on the larger issue of adverse possession for a period of time covering the commencement of the suit, and the judgment would necessarily fall on the vacation of this finding, unless the other facts found also show the better right to be in defendant. The difficulty suggested, therefore, if any there be, could not apply to this case, and the argument is without force here, whatever might be said had there been an express finding on the other issue. In this case, as we have seen, there was an appeal from the order denying a new trial upon the issue as to the adverse possession, and the Supreme Court held the finding to be amply supported by the evidence. Thus, it is manifest that the power of the courts is ample by vacating one or more of the findings, and by reversing or modifying judgments on appeal so as to restrict their operation, to fully guard and preserve all the rights of litigants without encroaching upon the application of the wholesome doctrine of *res adjudicata*. *Speyer v. Ihmels*, 21 Cal. 280, 288-9, is another example of the reversal of a judgment technically correct on the record for the protection of the rights of the parties. Upon my view, therefore, there is nothing either upon authority, or upon principle, to take the case out of the rule of estoppel invoked by defendant. If I am right thus far, then it was finally and conclusively determined in the former action between the same parties that the defendant had the title as against the complainant; for the adverse possession for the time prescribed, not only barred the

on that point left it in doubt, or because, for any reason, he preferred to rest his judgment on the defendant's title—on the real merits of the case—can there be any doubt that the matter would be *res adjudicata*? If he is authorized to find the issue, without passing upon the other issue, and his determination would be *res adjudicata*, he is certainly authorized to pass upon it in connection with the other issue, and if so determined, it must have the same force as a determination in the other mode. The question must be: "Was the issue in fact determined?" In the case before tried, the complaint of plaintiff alleged title in itself, possession at the commencement of the action, and an adverse claim on the part of the defendant, together with other matters. The defendant took issue directly on the allegation of title, and on the allegation of possession in plaintiff at the commencement of the action, but admitted making an adverse claim. Another answer, then, affirmatively alleged title in defendant itself, and as affirmative matter, also, directly alleged, in apt and proper form, an adverse possession during the period prescribed by the statute of limitations of Nevada, applicable to the subject. Thus the title of the plaintiff, his possession at the commencement of the suit, and the adverse possession of the defendant for the period prescribed by the statute of limitations to bar the action and vest the title in defendants, were each directly in issue, and each issue was in fact submitted by the parties and tried by the court without a jury. A special finding was filed, from which it appears exactly what was found, and, manifestly, all these three issues were found against the plaintiff. The court did not, in so many words, say in its finding that the plaintiff had no title, or, in so many words, that the plaintiff was not in possession at the time of the commencement of the action, but it found facts which necessarily showed that plaintiff had no title, and that defendant had title; and it found in express terms, in so many words: "That the agents of defendants, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding three, as working thereon for the 420 Company, and from that time until the

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commencement of this action, and until the trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to the plaintiff."

From the finding of the fact of adverse possession of defendant since 1865 it inferentially or argumentatively appears that the plaintiff could not have been in possession at the time of the commencement of the action. The court adds, as a conclusion of law, that the defendant is entitled to judgment, as prayed in the answer, and orders judgment accordingly. Upon these findings a judgment for the defendant, in the usual and proper form of a judgment on the merits, was entered, wherein, after reciting the filing by the judge of "his findings of the facts herein in favor of the defendant," "it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in the complaint, and that it take nothing by its action," and adjudged costs. This is certainly an appropriate judgment upon the finding on the issue as to adverse possession, and more appropriate to this issue than upon a finding merely against possession in the plaintiff at the time of the commencement of the action. It is not a judgment of nonsuit, or a judgment in form upon a plea in abatement, or a judgment in any manner without prejudice, but apparently and in form a judgment on the merits. As a matter of construction of the findings, and judgment, I also think it manifest that the judgment was intended by the judge to be based, and that it is based, upon the finding of adverse possession in the defendant for a period prescribed by the statute of limitations for barring the action and vesting title in the defendant, and on title in the defendant. The judge finds in express terms on that issue, and makes it the prominent finding in the case; while he does not find expressly on the issue as to the possession of plaintiffs at the commencement of the suit, but omits to say anything about that distinct issue presented on the allegation of the complaint.

It is only inferentially and argumentatively that we ascertain the fact of want of possession of the plaintiff at the

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very able, thorough and exhaustive printed arguments furnished—arguments every way worthy the importance of the questions involved and the very large pecuniary interests at stake.

Let the demurrer be sustained and the bill dismissed.

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III. SAWYER'S REPORTS.

ERRATA.

Page 107, line 20, for "given to the public acts" read "given *in each State* to the public acts."

114, line 3, for "*affidavit*" read "*the return of the sheriff.*"

172, last line, for "*is*" read "*are.*"

173, line 22, for "is fully" read "is *as* fully."

393, line 6, for "*patent*" read "*claim.*"

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28. MARITIME CONTRACT.—A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is a maritime one. *Id.*
29. NEGLIGENCE—PERIL OF THE SEAS.—Where the master of a steamer attempted to come up the bay of San Francisco in a dense fog, the vessel being in good safety, and the master not being compelled by any exigency to make the attempt, and the vessel was stranded: *Held*, that the master was guilty of negligence, and that the damage to the cargo was not to be attributed to perils of the seas. *The Steamer Costa Rica*, 538.
30. DESERTION BY SEAMAN.—When a seaman, against the orders of the master and knowing that the ship was about to sail, went ashore and failed to return to the ship, and subsequently, when apprehended by the master, broke away from his custody, and it appeared that further delay would have imperilled the ship: *Held*, that this conduct amounted to a desertion, and that the wages due the seaman were forfeited. *The Ship Ericson*, 559.

31. ALITER.—Where he has gone ashore by permission and without knowing that the ship was about to sail, and his failure to rejoin her is caused by drunkenness, but without any intention on his part to desert, but a qualified forfeiture will in such case be imposed. *Id.*
32. INJURIES BY NEGLIGENCE OF A FELLOW-SERVANT.—The owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate, where no personal negligence on the part of the owner appears. *Halverson v. Nisen*, 562.
33. COLLISION—BURDEN OF PROOF—ANCHOR WATCH.—Where a vessel breaks from her moorings, and comes into collision with another vessel also at anchor, the burden of proof is on the former to show *vis major*, or inevitable accident. The injured vessel held not to be in fault for omitting to set an anchor watch. *The Fremont*, 571.
34. LOG-BOOK, ENTRY OF OFFENSE IN.—A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596 of the revised statutes, unless an entry of the circumstances is made by the master in the official log-book of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner. *United States v. Brown*, 602.
35. SALVAGE—TOWAGE.—Ten thousand dollars awarded as salvage compensation. *Steamer Costa Rica*, 610.

See MARITIME LIEN, 1; COMMON CARRIER, 2, 3.

ADVERSE POSSESSION.

See STATUTE OF LIMITATIONS.

ALASKA.

1. CUSTOMS—ALASKA.—Section 12 of the act of March 3, 1825, (4 Stat. 118,) defining the crime of extortion under color of office, so far as officers of the customs are concerned, is an act relating to customs, and was therefore extended over Alaska by section 1 of the act of July 27, 1868. (15 Stat. 240.) *United States v. Carr*, 302.
2. ALASKA—CRIMES COMMITTED IN.—Alaska being a place without the limits of any State or judicial district of the United States, within the meaning of section 14 of the act of March 3, 1825, (4 Stat. 118, sec. 730 of the R. S.), this court has jurisdiction to try a person charged with the commission of a crime therein; provided such person is found in the district of Oregon or first brought here. *Id.*
3. SAME SUBJECT.—Section 5481 of the R. S. being passed June 22, 1874, after the cession of Alaska, is in force there from the time of its passage. *Id.*
4. ALASKA, INDIAN COUNTRY.—Upon the extension of sections 20 and 21 of the Indian Intercourse Act of 1834 over the territory of Alaska by force of the act of March 3, 1873, said territory became, so far as the introduction and disposition of spirituous liquors therein is concerned, what is known in the law as "Indian Country," and, therefore, the military force of the United States may be employed therein for the arrest of persons who violate either of said sections. *In re Carr*, 316.

5. SECTION TWENTY-THREE OF THE ACT OF 1834 IN FORCE IN ALASKA.

—Section 23 of said Indian Intercourse Act which authorizes the President to employ the military force of the United States to make arrests in the Indian country, was in force in Alaska so far as the introduction and disposition of spirituous liquors therein is concerned, from and after the extension of said sections 20 and 21 of said act over said territory. *Id.*

6. DETENTION OF PERSON ARRESTED IN INDIAN COUNTRY BY MILITARY AUTHORITY.—No person arrested by the military authority in the Indian country for the introduction or disposition of spirituous liquors therein, contrary to law, can be lawfully detained by such authorities more than five days after such arrest before removing him for delivery to the civil authorities for trial. *Id.*

7. ARREST BY MILITARY AUTHORITIES NOT AUTHORIZED EXCEPT UPON PROBABLE CAUSE.—A military officer in making an arrest under said section 23 acts as an officer of the civil law, and to justify such arrest it must appear upon oath that there is probable cause, as provided in the fourth amendment to the Constitution of the United States. *Id.*

ANSWER.

See PLEADING.

APPEAL AND WRIT OF ERROR.

1. JUDGMENT TECHNICALLY CORRECT REVERSED.—Where a judgment is broader in its scope, and more advantageous to a party than he is entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

2. SAME.—A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record. *Id.*

APPRAISEMENT.

See BOND, 1.

ASSESSMENT.

1. ASSESSMENT, WHEN VOID FOR UNCERTAINTY.—An assessment of real property should substantially comply with the requirements of the statute (Or. Code, p. 898) which requires each tract or parcel of land to be designated according to the United States surveys, if it be a subdivision of the same, or otherwise by specific metes and bounds or other certain description; therefore an assessment to the O. C. M. R. Co. of 196,008.99 of acres of land in Jackson county, in gross, without any other designation or description of the same, is void for uncertainty. *Tilton v. Or. Cent. Mil. Road Co.*, 22.

2. SAME SUBJECT.—An assessment of real property which contains no valuation of the same except this: "Total value of taxable property, 245,011," there being no mark or sign to indicate whether such figures were intended to represent eagles, dollars, cents or mills, or other thing capable of being numbered, is void for uncertainty. *Id.*

ASSIGNEE.

See BANKRUPTCY, 2.

ATTORNEY.

1. ASSIGNEE, ATTORNEY AND COUNSEL FOR.—An assignee can only be represented in the written proceedings by his duly appointed attorney; but this does not prevent another attorney from appearing in court, as counsel for the assignee in a particular proceeding therein pending, as provided in section 1000 of the Or. Civ. Code. *In re Comstock*, 517.
2. ATTORNEY, AUTHORITY OF.—An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee. *Id.*

BANKRUPTCY.

1. BANKRUPTCY—JOINT CREDITORS.—An agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before bankruptcy, to prove his claim as a joint creditor of the firm against the partnership estate. *In re Isaacs*, 35.
2. ASSIGNEE REPRESENTS THE CREDITORS.—An assignee represents the rights of the creditors and each of them, as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which, on grounds of public policy or otherwise, he would not be allowed to. *In re St. Helen Mill Co.*, 88.
3. ACT OF CONGRESS NOT RETROSPECTIVE.—The provision of the act of June 22, 1874 (11 Stat. 181,) amendatory of the bankrupt act, requiring one-fourth in number and one-third in amount of the creditors to join in a petition for an adjudication in bankruptcy, in cases commenced prior to its passage and since December 1, 1873, does not apply to any of such cases in which there had been an adjudication prior to the date of said act. *In re Comstock*, 128.
4. ADJUDICATION IN BANKRUPTCY.—A petition in bankruptcy is an action or suit, and an adjudication of bankruptcy thereon is a final judgment, which judgment is beyond the power of congress to annul or set aside. *Id.*
5. BANKRUPT ACT APPLICABLE TO RAILROAD COMPANIES. — *Held*:
 1. That the question of the constitutionality of the provisions of the Bankrupt Act which apply to persons other than merchants and traders is not longer open to discussion.
 2. That it has never been decided that a "law on the subject of bankruptcy," within the meaning of the Constitution, must provide for the discharge of all persons subject to its provisions.
 3. That railroad corporations are comprehended within the words "moneyed business or commercial corporations."
 4. That the court has authority to inquire into the value of securities held by creditors of the alleged bankrupt, in order to ascertain whether the debts due the petitioning creditors are of the amount required by

the act as amended—and that a secured creditor has a provable debt within the meaning of the act. 5. That the act declares that the word "person" shall include corporations, and service is therefore to be made personally on a corporation by delivering a copy of the petition and order to show cause to its head or principal officers, and the "usual place of abode" must be construed to mean the principal place of business where alone it can be said to reside. 6. That there is no provision of law, authority, or precedent, which requires that the authority under which an agent of the petitioning creditor's acts should be set forth; that the amended act provides that there need only be five signers, and allows both the signing and the verification to be done by an agent, when the first five signers, or any of them, are absent. 7. That by the sworn statements of the agent, as contained in the two petitions, it appears that one-third of the creditors have not united in the petition for an adjudication. The court is at liberty to examine the petition for an injunction, inasmuch as it might have been incorporated in the petition for an adjudication, and come to a conclusion on the facts therein stated, even though the petition for adjudication contains an explicit and positive averment that the debts due the petitioners amount to at least one-third of all the debts provable against the debtor. A debtor ought not to be compelled to file a full list of his creditors, when it appears from the sworn statements of the petitioning creditors that the requisite amount and number have not petitioned. Petitioning creditors allowed ten days further time, in which to obtain the consent of others to join in the petition. *In re California Pacific Railroad Co.*, 240.

6. **CERTIFICATE OF DEPOSIT—BANKRUPTCY OF MAKER.**—After the bankruptcy of the maker his certificates of deposit are dishonored paper, and after they have been proved as claims against his estate no longer possess the qualities of negotiable paper. *In re Sime*, 305.
7. **IDEM.**—Such claims are not entitled to the protection allowed by law to negotiable instruments, but stand on the same footing as a claim proved for an open account. *Id.*
8. **PURCHASER FOR VALUE.**—A person who takes an assignment of a claim proved in bankruptcy, as security for an antecedent liability from him in whose name the claim is proved, and who is apparently, though not really, the owner thereof, is not a purchaser for value and cannot hold the claim against the true owner. *Id.*
9. **PURCHASE AND SALE OF WHEAT.**—Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard, at Portland, at \$1.85 per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one-half of the money necessary to make the purchase, and to receive one-half of the profits, if any: *Held*, that the joint venture and the interest of C. & Co. in the wheat ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & H. as sellers of the same, to exercise the right of stoppage *in transitu*, and that when, upon the failure of M. & H., said L. & H. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the

- same, and not that of C. & Co., who were not the sellers of the wheat to M. & H., and had no power over it or interest in it. *In re Comstock*, 320.
10. SETTLEMENT BETWEEN DEBTOR AND CREDITOR.—A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights or credits, to the prejudice of other creditors, is not contrary to the Bankrupt Act, but the assignee of such debtor is not bound by such settlement, but may show that it is erroneous or fraudulent. *Id.*
 11. PREFERENCE.—A preference will not bar the proof of a debt, unless it was given and received by the parties to such debt, and therefore where a creditor received a preference from the firm of A., B. & C., he is not barred from proving another debt against the firm of B. & C. *Id.*
 12. RIGHT OF ATTACHING CREDITORS TO OPPOSE ADJUDICATION.—An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy on the ground of fraud and collusion between the petitioner and debtor. *In re Mendelsohn*, 343.
 13. ASSIGNMENT AS AN ACT OF BANKRUPTCY.—Even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the Bankrupt Act. *Id.*
 14. IDEM.—Within the meaning of the law defining acts of bankruptcy an assignment, invalid under the laws of the State where made, but used as a means for giving a preference, is an act of bankruptcy. *Id.*
 15. BANKRUPT LAW—AMENDMENTS OF JUNE, 1874.—Section 10 of the Amendatory Act, changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect. *Bradbury v. Galloway*, 346.
 16. IDEM.—Section 11 of the same act substituting "knowing" for "reasonable cause to believe," if it has any, has no greater retroactive force than the similar provision of the new section 39, and does not affect transactions happening before December 1, 1873, in cases where bankruptcy proceedings were begun before that date. *Id.*
 17. WITNESS BEFORE REGISTER.—A witness summoned before the register on the application of the assignee, to be examined under section 5087 of the R. S., is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the district judge upon any point or matter arising in the course of such proceeding." *In re Comstock*, 517.
 18. SAME, NOT ENTITLED TO COUNSEL.—A witness summoned as aforesaid, not being a "party" to the proceeding, is not entitled to be attended or represented by counsel during his examination. *Id.*
 19. CREDITOR NOT A PARTY TO EXAMINATION.—A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel. *Id.*
 20. ASSIGNEE, ATTORNEY AND COUNSEL FOR.—An assignee can only be represented in the written proceedings by his duly appointed attorney; but this does not prevent another attorney from appearing in court, as counsel for the assignee in a particular proceeding therein pending, as provided in section 1000 of the Or. Civ. Code. *Id.*

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21. ATTORNEY, AUTHORITY OF.—An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee. *Id.*
22. PROCEEDING IN BANKRUPTCY, NATURE OF.—A proceeding to have a debtor adjudged a bankrupt is substantially an action at law, and terminates with the final judgment on the petition or verdict therein; and the subsequent proceedings to ascertain and distribute the estate of the bankrupt are merely consequent upon such action, but no part of it. *In re Oregon Bulletin Co.*, 529.
23. SAME—REVIEW OF.—Such an action is a *case at law*, and the proceedings therein cannot be reviewed in the Circuit Court until after final judgment therein; and if the case, by the election of the defendant, becomes triable by jury, it cannot be reviewed otherwise than upon a writ of error. *Id.*
24. STAY OF PROCEEDINGS.—A stay of proceedings in bankruptcy in the District Court, is in the discretion of the Circuit Court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below. *Id.*
25. CASES AND QUESTIONS IN BANKRUPTCY—DIFFERENCE BETWEEN.—*Semble*, that all the appellate jurisdiction of the Circuit Courts in bankruptcy is conferred upon them by section 4986 of the R. S., and that section 4980 of said R. S. to section 4984, inclusive, do not confer any such power, but only regulates its exercise; that the terms *cases* and *questions* are used in said section 4986 in contradistinction to one another; that a case in bankruptcy, whether at law or equity, is only reviewable in the Circuit Court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction, which the Circuit Courts may exercise upon bill or petition, is confined to the review of the action of the District Courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy. *Id.*
26. FIRM PROPERTY SOLD ON JUDGMENTS AND EXECUTIONS AGAINST THE PARTNERS SEPARATELY.—Where judgments had been obtained before the commencement of proceedings in bankruptcy against each of two partners in trade by a separate creditor of each, and the firm property had been sold under executions issued on the separate judgments, and purchased by an agent of the plaintiff in the separate suits: *Held*, that neither he nor his assignee was entitled to hold the property as against the assignee in bankruptcy of the firm. *Osborn v. McBride*, 590.
27. JUDGMENT LIEN—APPEAL.—Where a creditor had obtained a valid lien on the bankrupt's property by judgment, execution and levy, from which the bankrupt had taken an appeal, but had not executed the bond necessary to cause the appeal to operate as a stay of proceedings, and the property had been sold subsequently to the bankruptcy and the proceeds brought into this court: *Held*, that the creditor was entitled to satisfaction out of the proceeds. *In re Gold Mountain Mining Co.*, 601.
28. PETITIONING CREDITORS—REQUISITE NUMBER AND AMOUNT.—The judgment of the court that the requisite number and amount of credi-

- tors have petitioned is final, and the matters so adjudged are not thereafter re-examinable, except in cases of fraud and imposition practiced on the court. *In re Funkenstein*, 605.
29. REVISED STATUTES AND OTHER ACTS PASSED AT SAME SESSION.—The Revised Statutes must be regarded as passed on the first day of December, 1873, and all other acts of the same session of Congress passed that date are to be treated as subsequent acts, repealing the Revised Statutes, so far as they are inconsistent therewith. *In re Oregon P. and P. Co.*, 614.
30. AMENDATORY BANKRUPT ACT OF 1874 CONSTRUED.—The act of June 22, 1874 (18 Stat. 178), purporting to amend and supplement the Bankrupt Act of 1867 must be regarded as having passed after the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed in the corresponding provisions of the Revised Statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. *Id.*
31. CORPORATION—NUMBER OF PETITIONING CREDITORS.—Since the passage of the amendatory and supplemental Bankrupt Act of June 22, 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation, as is required in the case of natural persons. *Id.*
32. CHARACTER OF CORPORATION ALLEGED.—A petition in bankruptcy against a corporation which does not show that the corporation is either a moneyed, business, or commercial corporation, is insufficient. *Id.*

BOND.

1. BOND FOR VALUE—APPRAISEMENT.—Where property under bonds for duties is seized in a warehouse, the bond for value under the 89th section of the act of 1799 should represent its full market value, duties included. *United States v. Cargo of Sugar*, 27.

BURDEN OF PROOF.

See ADMIRALTY, 33.

CHARGE.

See INSTRUCTIONS.

CHINA, TREATY WITH.

1. TREATY WITH CHINA OF JULY 28, 1868.—The sixth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China. *In re Ah Fong*, 144.

CIVIL RIGHTS.

1. CHINAMEN — CIVIL RIGHTS — INDICTMENT. — Where the indictment avowed that one Ah Koo was deprived of a right secured to him by the sixteenth section of the act of congress of May 31, 1870, in this, that there was exacted from him the sum of four dollars, by the defendant, who was then and there collector of taxes, in Trinity county, under color of a certain law of the State of California, which this indictment particularly sets forth, but the indictment contained no averment that Ah Koo was a foreign miner and within the provisions of the State law: *Held*, bad on demurrer. *United States v. Jackson*, 59.
2. TREATY WITH CHINA OF JULY 28, 1868. — The sixth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China. *In re Ah Fong*, 144.
3. FOURTEENTH AMENDMENT OF THE CONSTITUTION. — The Fourteenth Amendment to the Constitution declares that no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws: *Held*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police. *Id.*

CLERK'S CERTIFICATES.

1. CLERK'S CERTIFICATE — OF WHAT EVIDENCE. — The clerk of the United States District Court can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases. His certificate is not evidence of any other facts stated therein. *Le Roy v. Jamison*, 370.

CLOUD ON TITLE.

1. TAX DEED, A CLOUD ON TITLE. — Under the laws of Oregon (1865, p. 10), a tax deed is primary evidence of title and the regularity of the prior proceedings, which evidence can only be overcome by the proof of certain facts *dehors* the deed; therefore the same casts a cloud upon the title of the property. *Tilton v. Or. Cent. Mil. Road Co.*, 22.
2. TAX DEED. — The general statute authorizes a tax collector for State and county taxes to execute a deed upon a tax sale, and further provides that such deed shall be *prima facie* evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time,

and in the same manner as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the State and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be *prima facie* evidence of the regularity of the prior proceedings. *Minturn v. Smith*, 142.

3. TAX DEED—CLOUD ON TITLE.—A void tax deed which the statute does not make *prima facie* evidence of the regularity of the assessment and sale, does not cast a cloud upon title. *Id.*

COLLISION.

See ADMIRALTY, 83.

COMMON CARRIER.

1. CARRIER—NEGLIGENCE.—Although the carrier is exempt from liability for damage or deterioration arising from the nature of the goods or of the voyage, yet, if there has been a want of proper care or skill on his part in guarding against such damages, the injury will be ascribed to his negligence. *The Ship Invincible*, 176.
2. LIABILITY OF MASTER OF VESSEL.—The master, as well as the owners of a vessel, is a common carrier, and is personally responsible for his own negligence and misfeasances. *White v. McDonough*, 311.
3. SOLDIER DISCHARGED AT SEA, STATUS OF.—A soldier on board ship, for whose transportation the government had contracted was discharged at sea during the voyage: *Held*, that after his discharge the legal relation of passenger to master did not exist between him and the master, and that it was no breach of duty on the part of the master to allow the soldier to be subjected to military discipline as he was when the contract for carrying him was made and the voyage began. *Id.*
4. CARRIERS OF PASSENGERS.—Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident. *The Oriflamme*, 397.
5. PASSENGER ENTITLED TO BERTH.—An undertaking to carry a passenger in the steerage of a steamship from San Francisco to Portland includes the furnishing of such passenger with a berth, unless there is a fair understanding to the contrary. *Id.*

COMMISSIONER OF GENERAL LAND OFFICE.

1. COMMISSIONER OF LAND OFFICE, DUTIES.—The commissioner of the general land office is attached to the Department of the Interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The legislation of Congress respecting his office stated. *Patterson v. Tatum*, 164.

See MEXICAN GRANT, 1.

CONFESSIONS.

See CRIMINAL LAW, 7, 8.

CONSTITUTIONAL LAW.

1. **FOURTEENTH AMENDMENT OF THE CONSTITUTION.**—The Fourteenth Amendment to the Constitution declares that no State shall deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws: *Held*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police. *In re Ah Fong*, 144.
2. **STATUTE OF CALIFORNIA CONFLICTS WITH ACT OF CONGRESS.**—On the thirty-first of May, 1870, Congress passed an act declaring that "no tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void:" *Held*, 1. That the term *charge*, as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the State, to land within the State depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings; and, 2. That the statute of California, which prohibits foreign immigrants of certain classes, arriving in the State of California by vessel, from landing until a bond shall have been given by the master, owner or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the State in any other way, is in conflict with the act of Congress. *Id.*
3. **BANKRUPT ACT APPLICABLE TO RAILROAD COMPANIES.**—*Held*: 1. That the question of the constitutionality of the provisions of the Bankrupt Act which apply to persons other than merchants and traders is not longer open to discussion. 2. That it has never been decided that a "law on the subject of bankruptcy," within the meaning of the Constitution, must provide for the discharge of all persons subject to its provisions. *In re California Pacific Railroad Co.*, 240.

See GUARDIAN, 4, 5.

CONSTRUCTION OF STATUTES.

See REVISED STATUTES; STATUTES CONSTRUED.

CONTRACT.

See STOPPAGE IN TRANSITU.

COPYRIGHT.

1. **COPYRIGHTS.**—Under sections 4952 and 4956 of the Revised Statutes of the United States, an author cannot obtain an exclusive right to his work unless before publication he delivers to the librarian of Congress, or deposits in the mail, addressed to him, a printed copy of the title of

the work or map; and, also, within ten days from the publication, deliver to the said librarian, or deposit in the mail, addressed to him, two copies thereof. *Parkinson v. Laselle*, 331.

2. SAME—DEMURRER TO BILL.—A bill in chancery to restrain the infringement of a copyright, acquired under Chapter III, Title LX, of the Revised Statutes, which does not allege the performance of the acts required to be performed by the author in section 4956 of said statute, is insufficient. *Id.*

CORPORATION.

1. SEAL.—A corporation cannot execute a deed otherwise than under its seal. *In re St. Helen Mill Co.*, 88.
2. MORTGAGE—HOW CREATED.—A lien by way of mortgage can only be created by a deed under seal. *Id.*
3. DEED OF CORPORATION.—A corporation cannot make a deed unless the directors, or a majority of them, meet together as a board, and so determine; and the only evidence of such meeting and action is the "record" required to be kept by the secretary. *Id.*
4. STOCKHOLDERS' MEETING.—A stockholders' meeting has no authority to elect a president and secretary of the corporation. *Id.*
5. SAME—NOTICE OF.—Meeting of stockholders without notice is invalid. *Id.*
6. FOREIGN CORPORATION, ACTS OF, WHEN VOID.—A statute of Oregon provides that "a foreign corporation before doing business in the State, must duly execute" a power of attorney, appointing an agent upon whom all process may be served in suits against such corporation: *Held*, that such a corporation before complying with said act, had no power to contract or sue in the State, and that the act was prohibitory and anything done by the corporation contrary to it, was illegal and void. *In re Comstock*, 218.
7. ESTOPPEL IN PAIS.—The doctrine of estoppel *in pais* does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a foreign corporation made in violation of the above mentioned act, is not estopped to show its illegality for the purpose of preventing a recovery upon it. *Id.*
8. MONEYED CORPORATIONS.—Railroad corporations are comprehended within the words "moneyed business or commercial corporations," in the Bankrupt Act. The act declares that the word "person" shall include corporations, and service is therefore to be made personally on a corporation by delivering a copy of the petition and order to show cause to its head or principal officers, and the "usual place of abode" must be construed to mean the principal place of business where alone it can be said to reside. *In re California Pacific Railroad Co.*, 240.
9. CORPORATION—NUMBER OF PETITIONING CREDITORS.—Since the passage of the amendatory and supplemental Bankrupt Act of June 22, 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation, as is required in the case of natural persons. *In re Oregon Bulletin P. and P. Co.*, 614.

10. CHARACTER OF CORPORATION ALLEGED.—A petition in bankruptcy against a corporation which does not show that the corporation is either a moneyed, business, or commercial corporation, is insufficient. *Id.*

COSTS.

1. EXPENSES OF PRINTING BRIEF.—Section 918 of the Revised Statutes gives to the Circuit Court power to regulate the practice therein, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the Supreme Court: *Held*, that under this authority the court might, by general rule or special order in a particular case, require parties to a cause submitted to it for decision to file printed briefs, and might tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement. *Neff v. Pennoyer*, 335.

COUNTER-CLAIM.

See PLEADING.

CRIMINAL LAW.

1. CHINAMEN — CIVIL RIGHTS — INDICTMENT. — Where the indictment avowed that one Ah Koo was deprived of a right secured to him by the sixteenth section of the act of congress of May 31, 1870, in this, that there was exacted from him the sum of four dollars, by the defendant, who was then and there collector of taxes in Trinity county, under color of a certain law of the State of California, which this indictment particularly sets forth, but the indictment contained no averment that Ah Koo was a foreign miner and within the provisions of the State law: *Held*, bad on demurrer. *United States v. Jackson*, 59.
2. EXPENSE OF MAKING ARREST IN CRIMINAL CASES. — By paragraph 18 of section 829 of the Revised Statutes, the marshal is entitled to charge as part of the expense of serving a writ in a criminal case, a per diem paid his deputy, not to exceed two dollars per day. *United States v. Harker*, 237.
3. REMOVAL OF AN OFFENDER UNDER SECTION THIRTY-THREE OF THE JUDICIARY ACT.—An offender, after indictment found in one district, may, under that section, be arrested in any other district, and committed and removed, or bailed, as the case may be, for trial in the district where the indictment was found. *United States v. Haskins*, 262.
4. IDEM.—A duly authenticated copy of the indictment is sufficient evidence, if uncontradicted, to justify the commitment of the offender, and a warrant for his removal if bail is not given. *Id.*
5. IDEM—REMOVAL TO A TERRITORY.—For an offense against the United States committed in an organized Territory, the offender may be arrested in any district of the United States, and removed to the Territory for trial, if the territorial courts have cognizance of the offense. *Id.*
6. IDEM.—Territorial courts are "courts of the United States," as that designation is applied in section thirty-three of the Judiciary Act. *Id.*

7. CUSTOMS—ALASKA.—Section 12 of the act of March 3, 1825, (4 Stat. 118,) defining the crime of extortion under the color of office, so far as officers of the customs are concerned, is an act relating to customs, and was therefore extended over Alaska by section 1 of the act of July 27, 1868. (15 Stat. 240.) *United States v. Carr*, 302.
8. ALASKA—CRIMES COMMITTED IN.—Alaska being a place without the limits of any State or judicial district of the United States, within the meaning of section 14 of the act of March 3, 1825, (4 Stat. 118, sec. 730 of the R. S.,) this court has jurisdiction to try a person charged with the commission of a crime therein; provided such person is found in the district of Oregon or first brought here. *Id.*
9. SAME SUBJECT.—Section 5481 of the R. S. being passed June 22, 1874, after the cession of Alaska, is in force there from the time of its passage. *Id.*
10. INDICTMENT FOR SELLING LIQUOR TO INDIANS.—In an indictment under section 2139 of the Revised Statutes, for disposing of spirituous liquors to an Indian, it is necessary to allege that the defendant is not an "Indian in the Indian country." *United States v. Winslow*, 337.
11. INDIAN IN INDIAN COUNTRY.—The exception in said section, "an Indian in the Indian country," does not apply to the offense, but only to the person who may commit it. *Id.*
12. OREGON—INDIAN COUNTRY.—Section 5 of the act of June 5, 1850, (9 Stat. 437,) making Oregon Indian country, so far as the disposition of spirituous liquors to Indians is concerned, is not repealed by section 5596 of the Revised Statutes. *Id.*
13. AN INDICTMENT VOID FOR UNCERTAINTY.—An allegation in an indictment that the defendant did the act charged "on or about" a certain day is void for uncertainty; it does not show but that the action is barred by lapse of time. *Id.*
14. EXTORTION DEFINED.—Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due. *United States v. Waitz*, 473.
15. IDEM—REGISTER OF LAND OFFICE.—The register of a land office cannot lawfully act as attorney for any applicant for a patent for mineral land, whose application is filed, and the proceedings on which are to be conducted before him, and in his office. *Id.*
16. IDEM.—If a register undertakes to act as attorney for an applicant in procuring a patent, and receives from him a gross sum, and this sum is taken as well for the execution of his official duties as doing some other things relating to procuring the patent, and no specified portion of it is taken as compensation for the one or the other, and the sum so taken is in excess of the fees allowed him by law, such taking of the money is extortion. *Id.*
17. DIFFERENT COUNTS CHARGE BUT ONE CRIME.—An indictment under section 5479 of the Revised Statutes which charges the defendant with receiving, concealing, and aiding in the concealing, of gold dust stolen from the mails, only charges one crime, and proof of doing either will warrant a verdict of guilty. *United States v. Montgomery*, 544.
18. SEPARATE RECEIVING.—A defendant indicted with another for receiv-

- ing, concealing, and aiding in the concealing, of stolen property, may be found guilty thereon of a separate receiving, etc., when such other defendant has been discharged therefrom upon a plea of *autrefois convict*. *Id.*
19. RECEIVING, ETC., STOLEN PROPERTY.—What constitutes a guilty receiving, concealing, and aiding in the concealing, of stolen property under section 5479 aforesaid. *Id.*
20. POSSESSION OF GOODS EXCHANGED FOR STOLEN PROPERTY.—The possession of gold coin received at the mint in exchange for gold dust stolen from the mails, is not a possession of such dust. *Id.*
21. RECEIVING, ETC., WHERE DONE.—The receiving, etc., of the stolen property must have been done in the district where the indictment is found. *Id.*
22. PRESUMPTION OF INNOCENCE.—A defendant, however degraded or abandoned, is nevertheless presumed to be innocent of the crime charged in the indictment. *Id.*
23. WITNESSES.—Circumstances affecting the credibility of. *Id.*
24. CONFESSIONS.—What weight to be given to. *Id.*
25. AUTREFOIS CONVICT.—A plea of *autrefois convict* to an indictment charging the defendant with knowingly receiving gold dust stolen from the mails is sustained by evidence of a previous conviction of the crime of stealing the same dust from the mails upon the ground that the thief could not receive stolen goods from himself, and that his receipt and possession of the property, as such, was an integral part of the crime of larceny, of which he was already convicted. *United States v. Harmison*, 556.
26. JUDGMENT.—A court has power to set aside or modify its judgments, in both civil and criminal cases, during the term at which they were given. *Id.*
27. CRIMES.—The Legislature may carve out of a single transaction several crimes, but where a party is convicted of two crimes carved out of substantially one transaction, that fact ought to be considered in fixing the measure of his punishment. *Id.*
28. MAILING QUACK MEDICAL ADVERTISEMENT.—Knowingly depositing in the United States mail by the publisher, a newspaper, containing a quack medical advertisement giving information, how and where, articles for the production of abortion and prevention of conception could be obtained: *Held*, to be a violation of section 3893 of the Revised Statutes of the United States. *United States v. Kelly*, 566.
29. IDEM.—Such advertisement as published in the defendant's paper, and set out in the statement of the case: *Held*, to give information how, where, and of whom, articles designed to produce abortion, and for the prevention of conception could be procured. *Id.*
30. INDICTMENT UNDER SECTION 3893 R. S.—It is not necessary that the advertisement should indicate, or the indictment allege, any particular article or thing or its properties. *Id.*
31. IDEM.—The statute forbids the use of the mails for carrying any advertisement giving information where articles designed for producing abortions and the prevention of conception can be obtained or made; the indictment charged in the conjunctive "obtained and made," and it was held good, and that proof of either would be sufficient. *Id.*

32. LOG-BOOK, ENTRY OF OFFENSE IN.—A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596 of the revised statutes, unless an entry of the circumstances is made by the master in the official log-book of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner. *United States v. Brown*, 602.

CUSTOMS.

See ALASKA.

DAMAGES.

1. DAMAGES.—Where there is no evidence of the possession of the defendants at any time anterior to the date of the commencement of the suit to recover possession of land, only nominal damages can be allowed. *Mora v. Foster*, 469.
2. TREBLE DAMAGES.—In an action for cutting or carrying away timber from the land of another to entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint, so that the defendant may be apprised of the claim, and the facts stated in the complaint must bring the case within the statute. (Or. Civ. Code, Sec. 385.) *Neff v. Pennoyer*, 495.
3. DEFENSE TO CLAIM FOR TREBLE DAMAGES.—The defense to a claim for treble damages in such an action must be pleaded, and it may be either: 1. That the trespass was casual or involuntary; 2. Or that, at the time of the commission thereof, the defendant had probable cause to believe that the premises were his own, or those of the person under whom he acted; 3. Or that the timber was taken from uninclosed woodland for the purpose of repairing a highway or bridge. (Or. Civ. Code, Sec. 336.) *Id.*
4. IRRELEVANT ALLEGATION.—An allegation which merely contains facts tending to prove either of said defenses is irrelevant and will be stricken out on motion. *Id.*
5. TAXES PAID BY PARTY IN POSSESSION.—In an action for damages for withholding the possession of real property, if the defendant held under color of title in good faith adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding are a proper subject of counter-claim. *Id.*
6. DAMAGES FOR WITHHOLDING POSSESSION AND DEFENSE THERETO.—In action to recover damages for wrongfully withholding the possession of real property, the plaintiff may allege and recover for any particular waste or injury committed by the defendant thereon during his possession, or he may omit all claim other than that arising from such waste or injury, but he cannot by so doing preclude the defendant from showing that the alleged waste or injury was committed while he was in the possession of the premises, claiming title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts. *Id.*
7. DAMAGES FOR WITHHOLDING POSSESSION.—The right to damages for withholding the possession of real property given by the Oregon Code, (Secs. 313, 318) is equivalent to the action of trespass for mesne profits.

given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well for waste committed or suffered by the occupant as the value of the use and occupation; such right is a distinct cause of action, and if joined with a claim for possession, should be separately stated. *Wythe v. Meyers*, 595.

DEED.

See CORPORATION, 1, 2, 3; ADMINISTRATION, 16.

DEPOSITIONS.

See PRACTICE, 30-37.

DONATION ACT.

1. SETTLER UNDER DONATION ACT, WHEN MAY CONVEY.—Where a married settler under section 4 of the Donation Act has completed the residence and cultivation required by the act, and made proof thereof, he is entitled to a patent for his donation, and may convey the same in fee simple. (Per Mr. Justice FIELD.) *Wythe v. Palmer*, 412.
2. ESTATE OF SETTLER UNDER DONATION ACT.—The Donation Act is a grant *in presentii* to the settler thereunder, subject to the conditions of residence and cultivation required by the act; and until such conditions are performed the estate granted is defeasible, but when performed it becomes indefeasible. *Adams v. Burke*, 415.
3. PATENT TO SETTLER.—Upon the receipt and acceptance by the commissioner of the register and receiver's certificate, the right of a settler to a patent is perfect; but such patent does not pass the estate, that having been done by the act, and is only record evidence furnished by the government for the security of the donee, of the settlement and performance of the conditions annexed to the grant, and the partition of the same, where the settler is married, between himself and wife. *Id.*
4. TITLE AFTER DEATH.—Upon the death of a settler or his wife intestate, after compliance with the act and before patent issues, the estate of the intestate vests as directed by the act in the survivor and children or heirs of the deceased, but, *quere?* Do the persons in whom it vests take a new title from the government or only succeed under the act to the title of the intestate? *Id.*
5. ESTATE OF SETTLER UNDER DONATION ACT. — A settler under the Donation Act of Oregon before the completion of the residence and cultivation required by the act, had neither a descendible nor devisable estate in the donation; and upon his death prior to such completion, his interest in the premises ceased, and the same was granted by section 8 of said act to the heirs and widow, where one was left, of such settler, who took the land not as the heirs of the settler, but as the donees of the United States. *Hall v. Russell*, 506.
6. SAME SUBJECT.—In April, 1852, L., who had been a resident of Oregon prior to December 1, 1850, became a settler under the Donation Act upon the public lands, and made the necessary notification and proof of the commencement of his residence, and died in January, 1853:

32. LOG-BOOK, ENTRY OF OFFENSE IN.—A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596 of the revised statutes, unless an entry of the circumstances is made by the master in the official log-book of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner. *United States v. Brown*, 602.

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6. SAME SUBJECT.—In April, 1852, L., who had been a resident of Oregon prior to December 1, 1850, became a settler under the Donation Act upon the public lands, and made the necessary notification and proof of the commencement of his residence, and died in January, 1853:

- Held*, that upon the death of L. the premises passed, by virtue of section 8 of the Donation Act, to the heirs of L. as the donees of the United States, and that his devisees took no interest in the property. *Id.*
7. TITLE OF SETTLER UNDER DONATION ACT.—A settler under the Donation Act of Oregon acquires title to his donation from the passage of the act or the date of his settlement; and the patent which issues to him upon the performance of the conditions upon which the grant was made, is only record evidence of the existence of such title, or of the facts out of which it arose. *Wythe v. Haskell*, 574.
 8. PARTITION OF DONATION TO MARRIED SETTLERS.—Under said act the surveyor-general had authority to partition the donation of a married settler, in equal parts as to quantity, between him and his wife, at any point of the compass he might deem expedient; but his action in this particular, under section 1 of the act of July 4, 1836, (5 Stat., 107) was subject to the supervision of the commissioner of the general land office. *Id.*
 9. PATENT TO FOLLOW CERTIFICATE.—When the surveyor issued a certificate to a settler under the Donation Act, the commissioner of the general land office was required to issue a patent thereon and in conformity therewith, unless he found some valid objection thereto; and if said objection was found, it could not be disposed of by issuing a patent so far contrary to the certificate, but the certificate should have been returned to the local office for correction, and the patent issued upon such corrected certificate. *Id.*
 10. CERTIFICATE AND PATENT PARTS OF ONE TRANSACTION.—A certificate and patent thereon, issued under said act, are parts of the same transaction or procedure, and may be read together for the purpose of correcting or explaining the patent, and where there is an absolute contradiction between them, the certificate must prevail. *Id.*
 11. THE TERMS "SOUTH" AND "NORTH" HALF OF DONATION CONSTRUED. On July 28, 1853, the surveyor-general issued a certificate to William H. Willson and Chloe A., his wife, for donation 44, including the site of the town of Salem, assigning therein "the north half, parallel with the south line of the claim, to Chloe A. Willson, and the south half to William H. Willson," upon which certificate, on February 4, 1862, a patent was issued, giving to said William H., "the south half" of said donation, and to said Chloe A., "the north half" thereof: *Held*, that the certificate and patent, taken together, showed that the partition line of the donation was a line running south, 70 degrees 21 minutes east, and parallel with the southern boundary of the tract, and not a due east and west one. *Id.*

EJECTMENT.

1. ENTRY ON LANDS AFTER ACTION COMMENCED.—*Prima facie*, all parties entering upon land after suit in ejectment brought for its recovery, are in possession in subordination to the defendant, and are equally liable to be removed by the writ issued upon the judgment recovered against him. *Hall v. Dexter*, 434.
2. SAME.—EFFECT OF JUDGMENT.—But parties thus entering after suit brought by title existing previously, adverse to that of the parties, are not affected in their rights by the judgment recovered. *Id.*

3. **TAX SALE AFTER SUIT BROUGHT.**—A party asserting title under a tax sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation. *Id.*

See DAMAGES, 1.

EQUITY.

1. **COLLECTION OF TAX, WHEN RESTRAINED.**—A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof. *Tilton v. Oregon Central Military Road Co.*, 22.
2. **DISMISSAL OF BILL FOR WANT OF REPLICATION.**—Under the sixty-sixth equity rule prescribed by the United States Supreme Court, the order dismissing the complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to, or action by the judge. *Robinson v. Satterlee*, 134.
3. **SAME.**—The dismissal is final unless set aside by the court upon application duly made within the proper time in pursuance of the provisions of the rule. *Id.*
4. **SAME—LACHES.**—Where a bill has been dismissed for want of a replication under the sixty-sixth equity rule, a motion to set aside the dismissal made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied. *Id.*
5. **SUPPLEMENTAL ANSWER—FORMER JUDGMENT.**—Where leave to set up by way of amended answer a former judgment between the same parties upon the same subject-matter had been denied, pending an appeal from the judgment sought to be set up, leave to file a supplemental answer setting up said judgment was granted upon renewal of the motion upon leave after the judgment had become final by affirmance on appeal. (Per HOFFMAN, J. See statement of the case.) *Id.*
6. **PLEA TO BILL IN EQUITY.**—Plea to bill in equity may be good in part and bad in part. *Wythe v. Palmer*, 412.
7. **WHAT MATTER NOT REDUNDANT.**—In a suit in equity brought for an account of the gains and profits alleged to have accrued from making and using certain inventions patented, and for an injunction against further infringement, the Court made an order staying all proceedings in the suit until the plaintiffs could bring an action at law to determine their legal rights to the alleged invention: *Held*, That reference to the suit and order of the Court in the complaint in the action at law to show the limited purpose of the action, is not irrelevant or redundant. *Knox v. Great Western Quicksilver M. Co.*, 422.
8. **SAME TITLE QUIETED.**—A title acquired under a statute of limitations will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

See COPYRIGHT, 1; INJUNCTION; PLEADING, 1, 2; STATUTE OF LIMITATIONS, 13, 14, 15.

ERROR.

See APPEALS AND WRITS OF ERROR..

ESTOPPEL.

1. ESTOPPEL IN PAIS.—The doctrine of estoppel *in pais* does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a foreign corporation made in violation of the above mentioned act, is not estopped to show its illegality for the purpose of preventing a recovery upon it. *In re Comstock*, 218.
2. DEFENSES IN ABATEMENT AND ON MERITS.—Under the statute of Nevada authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be *res adjudicata*, and the parties will be estopped from further litigating the merits, even though the issue upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.
3. SAME.—In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue and in fact found by the court in favor of the defendant. *Id.*
4. SEVERAL DEFENSES IN SAME ANSWER.—Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses, and where all are in fact determined, the determination as to all will be conclusive between the parties. *Id.*
5. ESTOPPELS MUTUAL. — When the findings and judgment in a given case are conclusive on both parties if conclusive on one, the estoppel is mutual within the meaning of the rule requiring estoppels to be mutual. *Id.*
6. SAME.—A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record. *Id.*
7. PARTIAL NEW TRIAL.—A new trial may be granted, under the practice in Nevada, upon some issues without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment. The judgment in such case may be reversed, modified or affirmed, as justice may require; but there would be no estoppel as to the matter embraced in the finding vacated. *Id.*

EVIDENCE.

See CLERK'S CERTIFICATE, 1; PRACTICE, 30-37.

EXECUTION.

1. **MARSHAL HAS NO JUDICIAL POWER TO DETERMINE TITLE.**—The determination of the question whether parties thus entering have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant. *Hall v. Dexter*, 434.
2. **MARSHAL MAY REQUIRE INDEMNITY BOND.**—When such a party claims to have a title anterior to the suit the marshal may require from the plaintiff a bond of indemnity before proceeding to remove the party from the premises, or give a reasonable time to the party to apply to the court for a modification of the writ so as to exclude him from its operation. Upon such application the Court may stay the enforcement of the writ or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal is only discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants. *Id.*
3. **TAX SALE AFTER SUIT BROUGHT.**—A party asserting title under a tax sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation. *Id.*

FEES.

1. **EXPENSE OF MAKING ARREST IN CRIMINAL CASES.**—By paragraph 18 of section 829 of the R. S., the marshal is entitled to charge as part of the expense of serving a writ in a criminal case, a per diem paid his deputy, not to exceed two dollars per day. *United States v. Harker*, 237.

FOREIGNERS.

1. **POLICE POWER.**—The police power of the State may be exercised by precautionary measure against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The State may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. *In re Ah Fong*, 144.
2. **POWER OF STATE TO EXCLUDE FOREIGNERS.**—The extent of the power of the State to exclude a foreigner from its territory is limited by the right of self-defense. Whatever outside of the legitimate exercise of this affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to State control or interference. *Id.*
3. **STATUTE OF CALIFORNIA CONFLICTS WITH ACT OF CONGRESS.**—On the thirty-first of May, 1870, Congress passed an act declaring that

"no tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void:" *Held*, 1. That the term *charge* as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the State, to land within the State depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings; and, 2. That the statute of California, which prohibits foreign immigrants of certain classes, arriving in the State of California by vessel, from landing until a bond shall have been given by the master, owner or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the State in any other way, is in conflict with the act of Congress. *Id.*

FOREIGN MINER'S TAX.

See CRIMINAL LAW, 1.

FOREIGN CORPORATIONS.

See CORPORATIONS.

FORFEITURE.

See REVENUE.

FRAUD.

1. ENTRY DEFINED.—The term "entry," as used in section 1 of the act of March 3, 1863, must be understood to include the series of acts done by the importer at the custom-house necessary to the introduction of his merchandise into the United States, in compliance with the forms of law. *U. S. v. Cargo of Sugar*, 46.
2. FALSE DOCUMENT OR APPLIANCE.—If, in the performance of these acts, and as a means of making the entry, the importer is guilty of any false or fraudulent practice or appliance, or uses any false or fraudulent document, he comes within the law. *Id.*
3. AGENT.—Whether the agent who makes the entry had knowledge of the fraud is immaterial. The guilty knowledge of the owner is sufficient. *Id.*
4. FRAUDULENT APPLIANCE.—Where charcoal had been mixed with sugar above No. 12 Dutch standard in color, for the purpose of reducing its grade, and making it appear to be below No. 12 Dutch standard in color, and the importer failed to disclose that fact to the custom-house authorities: *Held*, that the color of the sugar was not thereby altered; it was merely disguised, and the concealment and suppression of that fact by the importer at the time of taking his oath and making his entry, and the oath taken by him, constituted "a false and fraudulent practice and appliance" within the meaning of the law; and this notwithstanding that the law does not require that the color of the sugar be stated in the invoice or entry. *Id.*

5. COLLECTOR DECEIVED.—Whether the collector was deceived by the attempted fraud, is immaterial. *Id.*
6. MISTAKE OF LAW.—The belief on the part of the importer that he might lawfully put charcoal into his sugar, and thus alter its grade, and enable himself to lawfully enter them as of a lower grade, and that he might lawfully withhold from the custom-house authorities knowledge of the facts, will be no protection to him. *Id.*

See GUARDIAN.

GUARDIAN.

1. GAURDIAN—APPOINTMENT WITHOUT NOTICE VOID.—Under the act of 1850, authorizing the appointment of guardians for non-resident minors having estates within the State, "after notice given to all persons interested in such manner as the judge shall order," an appointment of guardian without giving any notice whatever is void. *Seaverns v. Gerke*, 353.
2. RECORD MUST SHOW JURISDICTION.—In such case the record must affirmatively show that every act essential to give jurisdiction to make the appointment has been performed, or the appointment will be void. *Id.*
3. GUARDIAN'S SALE—WHEN VOID.—Where the appointment of a guardian is void by reason of its having been made without first acquiring jurisdiction by giving the notice required by the statute, all subsequent proceedings, including the sale of the ward's estate, are void. *Id.*
4. STATUTORY CONFIRMATION OF VOID SALE.—The statute of 1866, making valid all sales under orders of the Probate Court, where there have been "defects of form, or omissions, or errors," does not validate sales made where no jurisdiction to act at all has been acquired. It was only intended to embrace cases where defects, omissions or errors have arisen in the course of the exercise of jurisdiction already acquired. *Id.*
5. SAME.—If otherwise, the act itself is void for want of constitutional power in the Legislature by a legislative act to arbitrarily transfer the property of one party to another. *Id.*

HEIRS.

See ADMINISTRATOR; DONATION ACT, 2-4; GUARDIAN.

INDIANS AND INDIAN COUNTRY.

1. INDIANS PRESUMED TO BELONG TO TRIBE.—All Indians born and resident in Oregon are *prima facie* members of some Oregon tribe, and are therefore under the charge of the superintendent of Indian affairs in Oregon, appointed in pursuance of the act of June 5, 1850 (9 Stat. 437), within the meaning of section 20 of the act of June 30, 1834 (4 Stat. 732), as amended by section 1 of the act of March 16, 1864 (15 Stat. 29). *United States v. Wirt*, 161.
2. IF BORN IN MINNESOTA.—An Indian born in Minnesota is *prima facie* not a member of an Oregon tribe, though he might become such by adoption. *Id.*

3. ACT ABOLISHING OFFICE INOPERATIVE.—The clause in section 6 of the act of February 17, 1873 (17 Stat. 463), providing for the abolishing of Indian superintendencies after June 30, did not of itself abolish any such superintendency, but only took effect when and as the President designated and appointed. *Id.*
4. PAYMENT OF SALARY, EFFECT OF.—The payment of a superintendent's salary until September 1, 1873, is *prima facie* evidence that his office was continued until that time, although he was notified that his office was one of those selected under the act to be abolished. *Id.*
5. INDICTMENT FOR SELLING LIQUORS TO INDIANS.—In an indictment under section 2139 of the R. S. for disposing of spirituous liquors to an Indian, it is necessary to allege that the defendant is not an "Indian in the Indian country." *United States v. Winslow*, 337.
6. INDIAN IN INDIAN COUNTRY.—The exception in said section, "an Indian in the Indian country," does not apply to the offense, but only to the person who may commit it. *Id.*
7. OREGON—INDIAN COUNTRY.—Section 5 of the act of June 5, 1850, (9 Stat. 437), making Oregon Indian country, so far as the disposition of spirituous liquors to Indians is concerned, is not repealed by section 5596 of the R. S. *Id.*

See ALASKA, 3, 4, 5, 6.

INDICTMENT.

1. AN INDICTMENT VOID FOR UNCERTAINTY.—An allegation in an indictment that the defendant did the act charged "on or about" a certain day is void for uncertainty; it does not show but that the action is barred by lapse of time. *United States v. Winslow*, 337.
2. DIFFERENT COUNTS CHARGE BUT ONE CRIME.—An indictment under Section 5479 of the R. S. which charges the defendant with receiving, concealing, aiding in the concealing, of gold dust stolen from the mails, only charges one crime, and proof of doing either will warrant a verdict of guilty. *United States v. Montgomery*, 544.
3. SEPARATE RECEIVING.—A defendant indicted with another for receiving, concealing, and aiding in the concealing of stolen property, may be found guilty thereon of a separate receiving, etc, when such other defendant has been discharged therefrom upon a plea of *autrefois convict*. *Id.*
4. INDICTMENT UNDER SECTION 3893 R. S.—It is not necessary that the advertisement should indicate, or the indictment allege, any particular article or thing or its properties. *United States v. Kelly*, 566.
5. IDEM.—The statute forbids the use of the mails for carrying any advertisement giving information where articles designed for producing abortions and the prevention of conception can be obtained or made; the indictment charged in the conjunctive "obtained and made," and it was held good, and that proof of either would be sufficient. *Id.*

See CRIMINAL LAW.

INFANTS.

See MINORS; PRACTICE, 9.

INJUNCTION.

1. COLLECTION OF TAX, WHEN RESTRAINED.—A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof. *Tilton v. Oregon Central Military Road Co.*, 22.
2. TAX SALE—INJUNCTION.—An injunction will not be granted to restrain the collection of a tax, where the deed issued upon a sale for taxes would not cloud the title. *Minturn v. Smith*, 142.
3. INJUNCTION—PATENT.—On an application for an injunction against the infringement of a patent, the bill should show, either that the validity of the patent has been established in an action at law, or that the right of the complainant under the patent has been recognized and acquiesced in by long unquestioned use and enjoyment, or other equivalent acts. *Gutta-percha Co. v. Goodyear Rubber Co.*, 542.
4. KNOWLEDGE AGAINST OPINION.—Where a motion for an injunction against the infringement of a patent rests upon affidavits of dealers in the article, stating their opinion as to its composition, is opposed by counter-affidavits of the manufacturer of the article, who states the composition from his personal knowledge, other things being equal, the statements of the latter are the more reliable, and the injunction will be denied. *Id.*

See COPYRIGHT, 2.

INSTRUCTIONS.

1. ADVISING VERDICT.—Where, upon the evidence, the court is satisfied that there should be no recovery, and that a verdict, if found for the plaintiff, would necessarily be set aside for want of evidence to justify it, the jury will be advised to find for the defendant. *Kielly v. Belcher Silver Mining Co.*, 500.

INSURANCE.

1. PLEADING—LIFE INSURANCE POLICY.—Where, by the express terms of the policy, "the proposals, answers and declarations" made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded upon the policy. *Bidwell v. Connecticut Mutual Life Insurance Co.*, 261.

JUDGMENTS.

1. PRESUMPTIONS IN FAVOR OF JUDGMENTS.—There is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. *Galpin v. Page*, 93.
2. PERSONAL JUDGMENTS ON SERVICE BY PUBLICATION.—There can be no personal judgment upon constructive or substituted service by publication against a non-resident of a State, except as a means of reaching property situated at the time within the State, or of affecting some in-

terest therein, or determining the *status* of the plaintiff with respect to the non-resident party. *Id.*

3. ADMINISTRATOR—JUDGMENT, EFFECT OF.—If the title to real estate of the deceased is put in issue and determined in an action between the administrator and another, the judgment will bind the heir to the same extent that it binds the administrator. *Meeks v. Vassault*, 206.
4. JUDGMENT TECHNICALLY CORRECT REVERSED.—Where a judgment is broader in its scope, and more advantageous to a party than he is entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.
5. SAME.—A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record. *Id.*
6. PARTIAL NEW TRIAL.—A new trial may be granted, under the practice in Nevada, upon some issues without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment. The judgment in such case may be reversed, modified or affirmed, as justice may require; but there would be no estoppel as to the matter embraced in the finding vacated. *Id.*

See EJECTMENT, 1, 2; EXECUTION, 1, 2, 3.

JUDGMENT LIEN.

See BANKRUPTCY, 27.

JURISDICTION.

1. DISTRICT JUDGE SITTING AS CIRCUIT JUDGE.—A judge of a United States District Court, while sitting alone as circuit judge, in the United States Circuit Court, has the same powers and jurisdiction as any other judge sitting in the same court. *Robinson v. Satterlee*, 134.
2. TORTS ON THE HIGH SEAS, JURISDICTION OF.—The District Courts of the United States, as courts of admiralty, have jurisdiction of torts committed on the high seas, without reference to the nationality of the vessel on which they are committed, or that of the parties to them. *Bernhard v. Creene*, 230.
3. WHEN JURISDICTION OF, WILL BE DECLINED.—Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice would be as well done by remitting the parties to their home forum. *Id.*
4. WHEN NOT.—But where the suit is between foreigners, who are subjects of different governments, and therefore have no common home forum, the jurisdiction will not be declined. *Id.*
5. GUARDIAN—APPOINTMENT WITHOUT NOTICE VOID.—Under the act of 1850, authorizing the appointment of guardians for non-resident minors having estates within the State, "after notice given to all persons interested in such manner as the judge shall order," an appointment of guardian without giving any notice whatever is void. *Seaverns v. Gerke*, 353.

6. RECORD MUST SHOW JURISDICTION.—In such case the record must affirmatively show that every act essential to give jurisdiction to make the appointment has been performed, or the appointment will be void. *Id.*
7. GUARDIAN'S SALE—WHEN VOID.—Where the appointment of a guardian is void by reason of its having been made without first acquiring jurisdiction by giving the notice required by the statute, all subsequent proceedings, including the sale of the ward's estate are void. *Id.*
8. STATUTORY CONFIRMATION OF VOID SALE.—The statute of 1866, making valid all sales under orders of the Probate Court, where there have been "defects of form, or omission, or errors," does not validate sales made where no jurisdiction to act at all has been acquired. It was only intended to embrace cases where defects, omissions or errors have arisen in the course of the exercise of jurisdiction already acquired. *Id.*
9. CASES AND QUESTIONS IN BANKRUPTCY—DIFFERENCE BETWEEN.—*Semble*, that all the appellate jurisdiction of the Circuit Courts in bankruptcy is conferred upon them by section 4986 of the R. S., and that section 4980 of said R. S. to section 4984, inclusive, do not confer any such power, but only regulates its exercise; that the terms *cases* and *questions* are used in said section 4986 in contradistinction to one another; that a case in bankruptcy, whether at law or equity, is only reviewable in the Circuit Court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction, which the Circuit Courts may exercise upon bill or petition, is confined to the review of the action of the District Courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy. *In re Oregon Bulletin Co.*, 529.
10. REMOVAL OF SUITS FROM STATE TO NATIONAL COURTS.—A suit was pending in the Supreme Court of California on appeal from the judgment of the District Court at the date of the passage of the act of Congress of March 3, 1875, relating to the jurisdiction of the United States Circuit Court, in which the judgment was reversed and the cause subsequently remanded to the District Court for new trial. At the first term of the District Court at which a trial could be had after the filing of the remittitur and before any other trial, the suit was removed to the United States Circuit Court on application of the plaintiff: *Held*, That the case is within the provisions of sections 2 and 3 of said act of Congress, and that it was properly removed. *Hoadley v. City of San Francisco*, 553.

See ADMINISTRATOR, 16; ADMIRALTY; ALASKA, 2; PRACTICE, 4, 25.

LIEN.

See BANKRUPTCY, 27; MARITIME LIEN, 1, 3, 4, 5, 6, 7.

LIFE INSURANCE.

See INSURANCE.

LOG-BOOK.

See ADMIRALTY, 34.

LIMITATIONS, STATUTE OF.

1. **LIMITATION—NOTE PAYABLE ON DEMAND.**—A note payable on demand, whether with or without interest, is immediately due. An action may be maintained upon such a note without previous demand, and the statute of limitations begins to run from its date. *Bartlett v. Rogers*, 62.
2. **MEXICAN GRANT—LIMITATION.**—The statute of limitations of California does not begin to run against a confirmed Mexican grant, finally located under the act of congress of 1860 (12 Stat. 34), until the patent issues. *Le Roy v. Carroll*, 66.
3. **VOID PROBATE SALE—LIMITATION.**—Under section 190 of the probate act of California, an action to recover lands in the possession of a purchaser, at a sale made by an acting administrator under the orders of a Probate Court, even though the sale is void, must be brought within three years next after the sale, or it will be barred. *Meeks v. Vassault*, 206.
4. **ADMINISTRATION — LIMITATIONS — DISABILITIES.**—The pendency of administration and the inability of the heir to maintain an action to recover real estate by reason thereof, and of the present right of action being in the administrator, do not constitute a disability on the part of the heir within the meaning of section 191 of the probate act of California. Such a state of facts does not interrupt or prevent the running of the statute, as provided in section 190. *Id.*
5. **ADMINISTRATOR BARRED—HEIR BARRED.**—Where the administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir is a minor at the time the action accrues to the administrator. *Id.*
6. **SAME—REMEDY OF HEIR.**—In such case the heir has his remedy against the administrator and his bondsmen, or he may, in a proper proceeding, compel the administrator to sue. *Id.*
7. **TRUSTEE—CESTUI QUE TRUST.**—Where the trustee having the right of action is barred, the *cestui que trust* is barred. *Id.*
8. **ADMINISTRATOR—JUDGMENT, EFFECT OF.**—If the title to real estate of the deceased is put in issue and determined in an action between the administrator and another, the judgment will bind the heir to the same extent that it binds the administrator. *Id.*
9. **SECTIONS 258 AND 259 OF THE PROBATE ACT** do not limit the operation of section 190. *Id.*
10. **STATUTE OF LIMITATIONS—TITLE UNDER.**—An adverse possession of land for the time prescribed by the statute of limitations, vests the title thereto in the adverse possessor. *Id.*
11. **ADVERSE POSSESSION.**—To render a possession adverse it must be hostile in its origin and hostile in its continuance. *Adams v. Burke*, 415.
12. **POSSESSION WHILE RECOGNIZING ANOTHER TITLE NOT ADVERSE.**—The party through whom the defendants derive whatever interest they possess in this case went into possession asserting that the title was in the United States, and the defendants, during their possession, commenced a suit in one of the State courts to compel a transfer to them of the legal

title to the premises from the heirs of one Lownsdale, to whom a patent of the United States had been issued, and through whom the plaintiff traces his title, asserting in a verified complaint that the legal title was in such heirs and had been acquired by them by alleged settlement of their ancestor and the patent of the United States, and setting forth sundry acts and agreements by which it was contended that the heirs were bound to hold the title in trust for the defendants, and asking a decree that the heirs be declared trustees for their benefit; *Held*, that the complaint in that action, being verified, was an admission that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title in another, and an assertion of an equitable right to have that title transferred to them, and that there was therefore no such adverse possession by them as was contemplated by the statute. *Id.*

13. STATUTE OF LIMITATIONS.—In cases of concurrent jurisdiction, equity follows the law as to the Statute of Limitations; but in cases of purely equitable rights and titles equity is not bound by the statute, and only acts in analogy to it. *Hall v. Russell*, 506.
14. SAME SUBJECT.—The limitations of the several States in regard to actions at law are made applicable to like actions in the national courts by section 721 of the R. S., but this does not include special limitations concerning suits in equity, and therefore section 378 of the Oregon Civil Code prescribing a limitation of five years as to a suit in equity to affect a patent to land is not binding upon this court. *Id.*
15. APPLICATION OF STATUTE TO A SUIT IN EQUITY.—In May, 1866, a patent was issued to W. H. and J. Delay for the premises settled upon by L. in April, 1852, as the heirs of Joshua Delay, in pursuance of an alleged settlement upon the land by said J. D. subsequent to the death of L., in January, 1853; and in October, 1875, the devisees of said L. brought suit to charge the defendants, the assignees of said patentees, as trustees of the plaintiff, and to compel them to convey the premises to them as the successors in interest to L., the true and first settler; and it not appearing that the plaintiffs had ever been misled or deceived by the defendants or induced to forbear the assertion of their alleged rights, or that any relation of trust or confidence ever in fact existed between the parties, but it appearing that they claim under titles adverse in their origin: *Held*, that the limitation provided by section 378 of the Oregon Civil Code to suits in equity in the State court affecting a patent, ought to be applied to the suit in this court.
16. STATUTE OF LIMITATIONS.—Lapse of time short of twenty years is not a bar to an action to recover possession of real property where the defendant claims under a sale by an administrator, except where the sale was made under section 42 of chapter V of the Code of 1854, to pay the decedent's debts, and the plaintiff claims under such decedent. *Wythe v. Myers*, 596.
17. STATUTES OF LIMITATIONS AND MINING CLAIMS.—The statute of limitations of Nevada relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined for the purpose of ascertaining who is entitled to purchase a part of a mineral lode under the act of July 26, 1866. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

18. **TENANTS IN COMMON OUSTER.**—One tenant in common may oust his co-tenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession, they deal at arms-length, and there is no longer any relation of trust or confidence between them. *Id.*
19. **TITLE UNDER STATUTES OF LIMITATIONS.**—Adverse possession for the time limited by statutes of limitations not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder. *Id.*
20. **SAME—TITLE QUIETED.**—A title acquired under a statute of limitations will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred. *Id.*

See PRACTICE, 2.

LIQUORS, SPIRITUOUS.

See INDIANS AND INDIAN COUNTRY.

MARITIME LIEN.

1. **LIEN ON VESSEL IN CUSTODY.**—An owner who has regained possession of his vessel after seizure, either by successfully defending the original suit or by paying or giving bonds for the payment of the debts for which she was seized, cannot defeat an otherwise valid lien on the ground that the contract out of which it arose was made, and the consideration for it rendered, before the release and while the vessel was in the custody of the law. *The Schooner Witch Queen*, 17.
2. **MATERIAL MEN.—LIEN—APPURTENANCES.**—Where a vessel was supplied with a diving-bell, air-pump, and other apparatus not required for her use as a "navigating ship," but indispensable for the accomplishment of the enterprise in which she was about to engage: *Held*, that the lien of the material men extended to all articles belonging to the owner which (not being cargo) have been placed on board for the objects and purposes of this voyage. *The Schooner Witch Queen*, 201.
3. **PROCEEDS OF VESSEL.**—A person having an agreement for a mortgage upon a vessel has no such interest in the thing as will entitle him to claim the proceeds of her sale in the registry of the court. *The Favorite*, 405.
4. **EFFECT ON MORTGAGE ON VESSEL.**—Section 4192 of the Revised Statutes does not declare the effect of a mortgage absolutely or relatively, with reference to any other lien thereon. *Id.*
5. **PRIORITY OF LIEN.**—The lien of a mortgage given for labor in the construction of a vessel is not preferred to the lien of a material-man prior in date to the mortgage. *Id.*
6. **LIEN FOR SUPPLIES.**—The lien of a claim for supplies furnished a vessel in the course of navigation is preferred to that of a material-man or mortgagee. *Id.*
7. **LIEN FOR WAGES DISALLOWED.**—Where the owner of a vessel agreed to sell her to two purchasers for a certain sum, to be paid for in monthly installments, and gave immediate possession to the vendees; and it was further agreed that in case of default in the payments, the vessel should be returned to the owner, and the contract of sale rescinded;

and the proposed purchasers were in that case to pay \$125 per month for her use, while in their possession, deducting all sums paid on account of the purchase money, and default was made in the payments stipulated; but before the owner resumed possession under the contract, the libellant sold out his interest to his partner and was immediately employed by the latter to serve as pilot and mate: *Held*, that the libellant had no lien on the vessel in the hands of a subsequent vendee of the owner. *The Mary Elizabeth*, 491.

MARSHAL, UNITED STATES.

See EXECUTIONS, 1, 2, 3.

MASTER AND SERVANT.

1. MASTER AND SERVANT.—A servant takes upon himself the ordinary risks and perils of the service in which he voluntarily engages. *Kielley v. Belcher Silver Mining Co.*, 437.
2. *IDEM*.—These ordinary risks include all such as, arising out of the nature of the work, happen notwithstanding the exercise of due care, and, also, those arising from the negligence of those of his fellow-servants, who are engaged in the same department of the master's general business, and who are not his superiors in authority. *Id.*
3. *IDEM*—FELLOW-SERVANTS.—The rule which exempts the master from liability for injuries caused by one fellow-servant to another, does not extend to the case of servants serving in distinct departments of the master's general business. *Id.*
4. PLEADING IN SUITS FOR PERSONAL INJURIES.—In a suit to recover damages for injuries caused by a defective platform, it was alleged that the defendant provided the platform negligently, without any averment either that plaintiff was ignorant of the defect, or that it was known to defendant: *Held*, that the complaint was sufficient, and that knowledge on the part of plaintiff was a circumstance to convict him of concurring negligence, and proof of it should come from the defendant. *Knaresborough v. Belcher Silver Mining Co.*, 446.
5. *IDEM*—NEGLIGENCE.—Knowledge on the part of defendant is an ingredient of negligence, and may be proved under the general allegation of negligence. *Id.*
6. NEGLIGENCE OF FELLOW-SERVANT.—Where an injury results to a party from the negligence of a fellow-servant, in the same line of employment, there is no liability on the part of the employer, provided he has exercised due care in the selection of his servants. *Kielley v. Belcher Silver Mining Co.*, 500.
7. SAME EMPLOYMENT, WHAT?—Where several persons are employed in a mine, some breaking down the ore with picks and by blasting, and others at the same time loading and wheeling out the ore so broken down, those so engaged in breaking down the ore, and in loading and wheeling it out, are fellow-servants in the same line of employment, within the rule. *Id.*
8. KNOWLEDGE OF DANGERS.—Where a party employed in a dangerous occupation, wherein insufficient means are provided for avoiding the dangers, with full personal knowledge of all the dangers, and of the

want of proper means for guarding against them, voluntarily continues in such employment, he assumes the risk, and he cannot recover against his employer for injuries resulting from such known dangers, and known want of proper means for avoiding them. *Id.*

9. INJURIES BY NEGLIGENCE OF A FELLOW-SERVANT.—The owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate, where no personal negligence on the part of the owner appears. *Halverson v. Nisen*, 562.

MESNE PROFITS.

See DAMAGES, 7.

MEXICAN GRANT.

1. MEXICAN GRANT—LIMITATION.—The statute of limitations of California does not begin to run against a confirmed Mexican grant, finally located under the act of congress of 1860 (12 Stat. 34), until the patent issues. *Leroy v. Carroll*, 66.
2. AUTHORITY OF COMMISSIONER OF THE GENERAL LAND OFFICE.—Previous to the act of June 14, 1860, vesting jurisdiction in the District Court of the United States for California, over surveys of confirmed Mexican land claims, the commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land, and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836, reorganizing the general land office. It embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. This authority continues under the act of 1864. By the act of 1860, and so long as that act was in force, his power in this respect was withdrawn. That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing patents thereon. The course of procedure in such cases stated. *Leroy v. Jamison*, 369.
3. FINAL SURVEY OF MEXICAN LAND GRANT—PUBLICATION OF NOTICE.—To render a survey final under the act of 1860, when not submitted to the District Court, it was necessary that the publication required should be made, and though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the Surveyor-General was only *prima facie* evidence of the fact. *Id.*
4. "PLACE OF PUBLICATION DEFINED."—By the language: "*place of publication*" in the statute of 1860, requiring the Surveyor-General to give notices of surveys made by him by publication once a week for four weeks in two newspapers, one of which was to be in a paper where the "*place of publication*" was nearest to the land, reference is had to the place where the paper is first issued; that is, given to the public for circulation, and not to the place where the paper is subsequently distributed. *Id.*

5. NOTICE—WHAT IT MUST STATE.—A notice published by the Surveyor-General that he had examined and approved, under the act of 1860, of a particular rancho confirmed to designated parties, is not a compliance with the law requiring publication of notice that he had caused a survey and plat to be made of ——— land confirmed; or had approved of one made by others under his direction. *Id.*
6. CLERK'S CERTIFICATE—OF WHAT EVIDENCE.—The clerk of the United States District Court can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases. His certificate is not evidence of any other facts stated therein, *Id.*
7. COMMISSIONER'S DECISION—EFFECT OF.—The determination of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, as to the regularity and sufficiency of the alleged publication is conclusive, unless reviewed and corrected on appeal by the Secretary of the Interior. The right of the commissioner, upon proper application, to reconsider any matter previously determined by him, must be exercised before proceedings upon the original ruling have been taken and concluded. *Id.*
8. ACCEPTANCE OF PATENT.—No one can be compelled by the government to become a purchaser, or even to take a gift. In order that the patent of the government may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. The acceptance by the grantee of the conveyance, where no personal obligation is imposed, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. *Id.*
9. PATENT, WHEN IN CONDITION FOR ACCEPTANCE.—The deed of the government, that is its patent, is in a condition for acceptance when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. The record stands in the place of the offer or delivery in the case of a private deed; the instrument is thenceforth held for the grantee. *Id.*
10. OFFICERS' POWERS CEASE WITH RECORD OF THE PATENT.—With the record of the patent the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office, or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office. *Id.*
11. WHEN PRIOR APPLICATION FOR PATENT EVIDENCE OF ACCEPTANCE.—A previous application for a patent is evidence of its acceptance if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851, and when a patent is issued in conformity with proceedings regularly taken under the act, it takes effect without reference to any subsequent

- action of the patentee. But if the patent be issued without a final survey conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged. *Id.*
12. ACCEPTANCE OF PATENT WAIVER OF OBJECTIONS.—Objections by the patentee to the survey of a confirmed Mexican land claim are waived by his acceptance of the patent. *Id.*
 13. MEXICAN GRANT TO CHURCH.—A claim to land made by the Catholic bishop, of Monterey, by virtue of a Mexican grant to the church for religious purposes, is "of a right or title derived from the Spanish or Mexican governments," and is, by the terms of the act of Congress one, the validity of which, the board of land commissioners was authorized to consider and determine. *Mora v. Foster*, 469.
 14. SAME.—The board of land commissioners having adjudged the claim to be valid, and its decree not having been subsequently set aside or impeached by any direct proceeding for the purpose, it cannot be collaterally questioned in an action to recover the land based upon such confirmed title. *Id.*
 15. POWERS OF DEPARTMENTAL ASSEMBLY.—The Departmental Assembly of California under the Mexican government, had no power to authorize the sale of any lands other than those of the department. It could not confer upon the government any power over the domain of the nation, its authority upon that subject being limited by the colonization laws to the approval or disapproval of grants made by the governor under those laws. *Id.*
 16. TWO CONFIRMED GRANTS.—Where a grant made to the church for religious purposes in 1796, was finally confirmed by the board of land commissioners to the Roman Catholic bishop of Monterey, and another grant to another party embracing the same land by governor Pio Pico, in 1845, upon a sale made by direction of the Departmental Assembly, was also finally confirmed: *Held*, That the latter grant affords no defense to an action to recover possession of the land founded upon the former. *Id.*
 17. DAMAGES.—Where there is no evidence of the possession of the defendants at any time anterior to the date of the commencement of the suit to recover possession of land, only nominal damages can be allowed. *Id.*
 18. THE TITLE OF THE CITY OF SAN FRANCISCO, under the Mexican law, was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties. *United States v. Carr*, 477.
 19. LANDS OCCUPIED FOR PUBLIC USES WITHIN EXCEPTIONS OF ACT OF CONGRESS.—As against parties having no title in themselves, holding

by intrusion, mere trespassers, the possession of the government for a hospital for infirm and disabled seamen, of a part of the four lots in the city of San Francisco, upon which the hospital is situated, under a deed from the city authorities, with claim to the remainder of the lots for the same purposes, and the assertion of that claim by the removal of the intruders, is an occupation for public uses of the whole premises, within the meaning of the act of Congress of 1864, which excepts from the grant to the city "all sites or other parcels of land" which had been or were then occupied for such uses by the United States. *Id.*

20. DEDICATION TO PUBLIC USES.—The setting apart of the premises for a hospital by direction of the government, with the appropriation by Congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act of March 8, 1866, both of which excepted from confirmation to the city parcels of land which had been previously reserved or dedicated to public uses. *Id.*

MINING CLAIMS.

1. PATENT TO MINING CLAIM — WHO ENTITLED TO.—Under the act of Congress of 1866 (14 Stat. 251) the right to purchase a mining claim to a gold or silver-bearing lode and to receive a patent therefor from the United States, was granted to the person, or association of persons, who, in pursuance of the laws of the State or Territory, and the mining customs, rules and regulations of the place embracing the location, recognized and enforced by the courts, is the owner, and entitled to the possession, as against everybody except the United States. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.
2. PRE-EMPTION.—The right given is simply a right of purchase, and is in the nature of a pre-emption right, founded upon like principles as the pre-emption laws; and not a right similar or analogous to that of a grantee under an inchoate or imperfect Mexican grant. *Id.*
3. STATUTES OF LIMITATIONS AND MINING CLAIMS.—The statute of limitations of Nevada relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined for the purpose of ascertaining who is entitled to purchase a part of a mineral lode under the act of July 26, 1866. *Id.*
4. PAROL PARTITION.—A parol partition executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which possession and partition are acquiesced in by the parties is valid; and upon such a partition the parties cease to be tenants in common. *Id.*
5. TENANTS IN COMMON OUSTER.—One tenant in common may oust his co-tenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession, they deal at arms-length, and there is no longer any relation of trust or confidence between them. *Id.*
6. TITLE UNDER STATUTES OF LIMITATIONS.—Adverse possession for the time limited by statutes of limitations not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder. *Id.*

7. SAME—TITLE QUIETED.—A title acquired under a statute of limitations will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred. *Id.*

MINORS.

1. BRITISH SHIPPING ACT.—Where, under the British merchant's shipping act of 1854, the duration of a voyage is described in the shipping articles as *probably* twelve months, a seaman signing the articles engages absolutely to make the voyage, whether the duration of it be more or less than that period, provided the master in good faith endeavors to accomplish the voyage within the time mentioned. *The Hotspur*, 194.

See GUARDIAN.

MISTAKE.

See FRAUD, 6.

MORTGAGE.

See CORPORATION, 2; MARITIME LIEN, 3-6.

MOTION.

1. JURISDICTION—LEAVE TO RENEW MOTION.—Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew the motion. *Robinson v. Satterlee*, 134.

MULTIFARIOUSNESS.

See PLEADINGS, 1, 2.

NEGLIGENCE.

1. CARRIER—NEGLIGENCE.—Although the carrier is exempt from liability for damage or deterioration arising from the nature of the goods or of the voyage, yet, if there has been a want of proper care or skill on his part in guarding against such damages, the injury will be ascribed to his negligence. *The Ship Invincible*, 176.
2. PLEADING IN SUITS FOR PERSONAL INJURIES.—In a suit to recover damages for injuries caused by a defective platform, it was alleged that the defendant provided the platform negligently, without any averment either that plaintiff was ignorant of the defect, or that it was known to defendant: *Held*, that the complaint was sufficient, and that knowledge on the part of plaintiff was a circumstance to convict him of concurring negligence, and proof of it should come from the defendant. *Knaresborough v. Belcher Silver Mining Co.*, 500.
3. IDEM—NEGLIGENCE.—Knowledge on the part of defendant is an ingredient of negligence, and may be proved under the general allegation of negligence. *Id.*
4. NEGLIGENCE OF FELLOW-SERVANT.—Where an injury results to a party from the negligence of a fellow-servant, in the same line of employment, there is no liability on the part of the employer, provided he has exercised due care in the selection of his servants. *Kielley v. Belcher Silver Mining Co.*, 500.

5. SAME EMPLOYMENT, WHAT?—Where several persons are employed in a mine, some breaking down the ore with picks and by blasting, and others at the same time loading and wheeling out the ore so broken down, those so engaged in breaking down the ore, and in loading and wheeling it out, are fellow-servants in the same line of employment, within the rule. *Id.*
6. KNOWLEDGE OF DANGERS.—Where a party employed in a dangerous occupation, wherein insufficient means are provided for avoiding the dangers, with full personal knowledge of all the dangers, and of the want of proper means for guarding against them, voluntarily continues in such employment, he assumes the risk, and he cannot recover against his employer for injuries resulting from such known dangers, and known want of proper means for avoiding them. *Id.*
7. NEGLIGENCE—PERIL OF THE SEAS.—Where the master of a steamer attempted to come up the bay of San Francisco in a dense fog, the vessel being in good safety, and the master not being compelled by any exigency to make the attempt, and the vessel was stranded: *Held*, that the master was guilty of negligence, and that the damage to the cargo was not to be attributed to perils of the seas. *The Steamer Costa Rica*, 538.
8. INJURIES BY NEGLIGENCE OF A FELLOW-SERVANT.—The owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate, where no personal negligence on the part of the owner appears. *Halverson v. Nisen*, 562.

See MASTER AND SERVANT, 1, 2, 3.

NEW TRIAL.

1. PARTIAL NEW TRIAL.—A new trial may be granted, under the practice in Nevada, upon some issues without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment. The judgment in such case may be reversed, modified or affirmed, as justice may require; but there would be no estoppel as to the matter embraced in the finding vacated. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

OFFICIAL BONDS.

See SURETIES, 1, 2.

PARTITION.

1. PAROL PARTITION.—A parol partition executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which possession and partition are acquiesced in by the parties is valid; and upon such a partition the parties cease to be tenants in common. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

See DONATION ACT, 8.

PARTNERSHIP.

1. **BANKRUPTCY—JOINT CREDITORS.**—An agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before bankruptcy, to prove his claim as a joint creditor of the firm against the partnership estate. *In re Isaacs*, 35.
2. **FIRM PROPERTY SOLD ON JUDGMENTS AND EXECUTIONS AGAINST THE PARTNERS SEPARATELY.**—Where judgments had been obtained before the commencement of proceedings in bankruptcy against each of two partners in trade by a separate creditor of each, and the firm property had been sold under executions issued on the separate judgments, and purchased by an agent of the plaintiff in the separate suits: *Held*, that neither he nor his assignee was entitled to hold the property as against the assignee in bankruptcy of the firm. *Osborn v. McBride*, 590.

PASSENGERS.

See ADMIRALTY, 16-20.

PATENT.

1. **INFRINGEMENT OF COMBINATION.**—Where the patent is for a combination of several distinct parts, a machine not embracing all the parts that go to make up the combination, does not infringe the patent. *Fisher v. Craig*, 69.
2. **ANTICIPATION.**—Where there are two patented machines for hydraulic mining, each having a supply-pipe and a discharge-pipe coupled by a horizontal swivel-joint in combination with a nozzle connected by a joint which enables the operator to elevate or depress the nozzle, and the claim is for a combination of these several parts for the accomplishment of the same object, the prior machine will be an anticipation of the later, although the joint in the latter is a semi-universal or knuckle metallic joint, while that in the former is made of india-rubber or other flexible material. *Id.*
3. **SAME—MECHANICAL SUBSTITUTE.**—The metallic joint in the later machine being old, and it having been long in use for the purposes required in the machine in question, it is but a known mechanical substitute in the combination for the flexible joint in the prior machine, and, for the purposes of the combination, must be regarded as the same thing as the joint in the earlier combination. *Id.*
4. **PATENT, A GOVERNMENT CONVEYANCE.**—A patent is the instrument by which the government, whether State or National, passes its title; it is the government conveyance. But if the government possesses at the time no title, that fact may be shown in an action of ejectment. The patent is evidence of title, only because government, being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. A court of law is as competent to pass upon the question whether a title existed at the time in the government, as it is whether the title existed in an

- individual, where the grantor is a private party. The cases where a party must resort to a court of equity for relief against the operation of a patent stated. *Patterson v. Tatum*, 164.
5. PATENTS—MULTIFARIOUSNESS.—Where two separate patents for improvements in the manufacture of brooms owned by the complainant are alleged to have been infringed by the defendant, and the broom manufactured by the defendant appears to be an infringement of both patents, the bill is not bad for multifariousness. *Gillespie v. Cummings*, 259.
6. SAME.—Where the right to both patents alleged to be infringed for the State of California, has been assigned to complainant, the bill is not bad for multifariousness, because the assignment of one of the patents also embraces other territory than the State of California. *Id.*
7. ORIGINAL PATENT FOR PROCESS.—Where the specifications in a patent particularly describe four different modes of exploding nitro-glycerine: 1. By exploding gunpowder confined in a waterproof tube in contact with it; 2. By an electric spark or current; 3. By inserting in the liquid a thin case containing some substance evolving heat; 4. By a fuse; and claimed as his invention "the use of nitro-glycerine or its equivalent substantially in the manner and for the purposes described:" *Held*, that the patent is for a process and not for a compound. (Per Mr. Justice FIELD.) *Giant Powder Co. v. California Powder Works*, 448.
8. RE-ISSUE FOR COMPOUND.—The original patent having been surrendered, there were re-issues in several divisions; one for a compound of nitro-glycerine and gunpowder; one for a compound of nitro-glycerine and gun-cotton; and one for a compound of nitro-glycerine and rocket powder: *Held*, that each of these re-issues is a patent for a compound, not for a process. (*Id.*) *Id.*
9. RE-ISSUES VOID.—The original patent being for a process and the three re-issues mentioned being for compounds, they were not embraced in the invention originally described and patented, and the re-issues are void. (*Id.*) *Id.*
10. RE-ISSUE, WHEN AUTHORIZED.—Under section 53 of the act of 1870, (16 Stat., 205) a re-issue is not authorized unless the original patent is inoperative or invalid from a defective or insufficient specification, or the claim of the patentee exceeds his right. (*Id.*) *Id.*
11. SAME.—MACHINE PATENTS.—In determining the propriety of a re-issue no new matter can be introduced except in cases of machine patents. (*Id.*) *Id.*
12. RE-ISSUE OF PATENTS OTHER THAN FOR MACHINES.—If the patent does not relate to a machine, the specification, if defective, may be made more definite and certain, so as to embrace the claim made, or the claim may be so modified as to correspond with the specification; but this is the extent to which modifications can be made in such cases. (*Id.*) *Id.*
13. NOBEL'S ORIGINAL PATENT was neither inoperative nor invalid by reason of any defect or insufficiency of the specifications of the patent set out in the statement of the case. The specification was unambiguous and covered all that was claimed; but, if otherwise, no new matter not relating to the process claimed, but relating to compounds made by uniting nitro-glycerine with other substances, could be added to the specifications. (*Id.*) *Id.*

14. RE-ISSUES UNDER THE STATUTE must be for the same invention which was embraced in the original patent, or if re-issued in divisional parts, each division must be for some distinct and separate part of that invention. (Id.) *Id.*
15. CHANGE OF SPECIFICATIONS AND RE-ISSUES.—Where the inventor originally filed specifications embracing both compounds and cognate processes, but afterwards filed amended specifications omitting the compounds, and the patent issued upon the amended specifications which were alone attached thereto, upon an application for re-issues in divisions, the commissioner of patents is limited in his re-issues to the invention embraced in the amended specifications attached to the original patent, and cannot look at the specifications first filed, and afterwards abandoned, to ascertain what the invention sought to be patented was. (Id.) *Id.*
16. RE-ISSUE OF A RE-ISSUE.—Where a patent is surrendered and a re-issue obtained, a second re-issue on surrender of the first, must be limited to the invention embraced in the first re-issue. (Id.) *Id.*
17. CONSTRUCTION OF ORIGINAL AND RE-ISSUED PATENTS.—Where upon a comparison of the original and the re-issued patents, it appears upon the face of the patents that the latter is not for the same, or some part of the same invention as that embraced in the former, it will be adjudged void on the ground that it was issued without authority. (Id.) *Id.*
18. RE-ISSUES UNDER ACT OF 1836.—On an application for a re-issue of a patent under the Act of 1836, the commissioner was not authorized to look beyond the patent as originally granted with the specifications and diagrams thereto annexed, and the models deposited in the patent office, for the purpose of ascertaining what invention was intended to be patented. (Per SAWYER, Circuit Judge.) *Id.*
19. NOBEL'S PATENT WITHIN THE RULE.—Nobel's patent having been issued in 1865, his rights accrued and they must be determined under the provisions of the act of 1836, and there being no model, upon an application for a re-issue made prior to the passage of the act of 1870, he would be limited in the re-issue to the invention as described, substantially indicated or suggested in the original patent, and the specifications and drawings appended thereto. *Id.*
20. INJUNCTION—PATENT.—On an application for an injunction against the infringement of a patent, the bill should show, either that the validity of the patent has been established in an action at law, or that the right of the complainant under the patent has been recognized and acquiesced in by long unquestioned use and enjoyment, or other equivalent acts. *The Gutta Percha Co. v. The Goodyear Rubber Co.*, 542.
21. KNOWLEDGE AGAINST OPINION.—Where a motion for an injunction against the infringement of a patent rests upon affidavits of dealers in the article, stating their opinion as to its composition, is opposed by counter-affidavits of the manufacturer of the article, who states the composition from his personal knowledge, other things being equal, the statements of the latter are the more reliable, and the injunction will be denied. *Id.*

See PLEADING, 5.

PLEADING.

1. **PATENTS—MULTIFARIOUSNESS.**—Where two separate patents for improvements in the manufacture of brooms owned by the complainant are alleged to have been infringed by the defendant, and the broom manufactured by the defendant appears to be an infringement of both patents, the bill is not bad for multifariousness. *Gillespie v. Cummings*, 259.
2. **SAME.**—Where the right to both patents alleged to be infringed for the State of California, has been assigned to complainant, the bill is not bad for multifariousness, because the assignment of one of the patents also embraces other territory than the State of California. *Id.*
3. **PLEADING—LIFE INSURANCE POLICY.**—Where, by the express terms of the policy, "the proposals, answers and declarations" made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded upon the policy. *Bidwell v. Connecticut Mutual Life Insurance Co.*, 261.
4. **SAME—DEMURRER TO BILL.**—A bill in chancery to restrain the infringement of a copyright, acquired under Chapter III, Title LX, of the Revised Statutes, which does not allege the performance of the acts required to be performed by the author in section 4956 of said statute, is insufficient. *Purkinson v. Laselle*, 330.
5. **WHAT MATTER NOT REDUNDANT.**—In a suit in equity brought for an account of the gains and profits alleged to have accrued from making and using certain inventions patented, and for an injunction against further infringement, the Court made an order staying all proceedings in the suit until the plaintiffs could bring an action at law to determine their legal rights to the alleged invention: *Held*, That reference to the suit and order of the Court in the complaint in the action at law to show the limited purpose of the action, is not irrelevant or redundant. *Knox v. Great Western Quicksilver M. Co.*, 422.
6. **COUNTER-CLAIM.**—A counter-claim is substantially a cross-action, and should contain nothing but the facts necessary to constitute it; and if any other defense is inserted therein, it may be stricken out. *Neff v. Pennoyer*, 495.
7. **IMPROVEMENTS—COUNTER-CLAIM FOR.**—To enable a defendant to maintain a counter-claim for the value of improvements made upon the premises of another, it must appear therefrom that the improvements are affixed to the freehold and still existing, and that they better the condition of the property for the ordinary purposes for which it is used; and that they were made while the defendant, or those under whom he claims, were in possession under color of title, in good faith, adversely to the claim of the plaintiff. (Or. Civ. Code, Sec. 318.) *Id.*
8. **SAME SUBJECT.**—A counter-claim not containing these allegations, but only a statement of facts tending to prove them, will be stricken out as irrelevant. *Id.*
9. **IRRELEVANT ALLEGATION.**—In an action to recover the possession of real property, a statement in the answer of the grounds upon or means by which the defendant claims to be the owner of the property is irrelevant, and may be stricken out on motion. *Wythe v. Meyers*, 596.

10. FRIVOLOUS ALLEGATION.—An allegation in the answer to the effect that the defendant derives title to the premises from the administrators of W. H. Willson, it not appearing that said Willson was ever seised or possessed of the property, is frivolous, and may be stricken out on motion. *Id.*
11. SAME SUBJECT.—An allegation that the administrators of said Willson conveyed the premises to the defendant's grantors on March 30, 1859, "in obedience to an order of the Probate Court of Marion county," of March 29, 1859, may be stricken out as frivolous and irrelevant—it not appearing therefrom that said order was duly or lawfully made, or that such court had authority to make the same. *Id.*
12. ALLEGATION OF OWNERSHIP.—The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title from which it does not appear that he is such owner, the matter may be stricken out as sham. *Id.*
13. COUNTER-CLAIM FOR IMPROVEMENTS.—A counter-claim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used. *Id.*
14. CITIZENSHIP OF PARTIES.—If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out; but is not liable to a demurrer. *Id.*
15. DEFENSES IN ABATEMENT AND ON MERITS.—Under the statute of Nevada authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be *res adjudicata*, and the parties will be estopped from further litigating the merits, even though the issue upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.
16. SAME.—In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue and in fact found by the court in favor of the defendant. *Id.*
17. SEVERAL DEFENSES IN SAME ANSWER.—Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses, and where all are in fact determined, the determination as to all will be conclusive between the parties. *Id.*

POLICE POWERS.

1. **POLICE POWER.**—The police power of the State may be exercised by precautionary measure against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The State may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. *In re Ah Fong*, 144.
2. **POWER OF STATE TO EXCLUDE FOREIGNERS.**—The extent of the power of the State to exclude a foreigner from its territory is limited by the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to State control or interference. *Id.*

PRACTICE.

1. **CONTINUATION OF ACTION BY ADMINISTRATOR.**—The right of an administrator to prosecute an action commenced by the deceased (1 Stat. 8, sec. 31), is upon the condition that the cause of action survives, and that depends upon the local law—in Oregon, upon sections 365 and 366 of the Civil Code. *Baker v. Ladd*, 44.
2. **LIMITATION OF SUCH RIGHT.**—Section 34 of the Oregon Civil Code, which limits the time to one year, within which the court may allow an action to be continued by the administrator, applies to actions in this court. (17 Stat. 197, sec. 5.) *Id.*
3. **WILL—FOREIGN PROBATE.**—The probate of a will and issue of letters testamentary in the State of New York, do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the State of California. *Bartlett v. Rogers*, 62.
4. **OBJECTION—WHEN TAKEN.**—The objection may be taken at the hearing, where it does not appear on the face of the complaint where letters are issued, and issue has been joined on the allegation of the complaint that letters testamentary have been duly issued to the plaintiffs. *Id.*
5. **UNITED STATES COURTS—STATE LAWS.**—The courts of the United States are not bound by the decisions of the State courts upon questions of general law. It is only decisions upon local questions which are peculiar to a State, or adjudications upon the meaning of the constitution or statutes of a State, which the courts of the United States adopt as rules for their judgments. *Galpin v. Page*, 99.
6. **RELATION OF NATIONAL COURTS TO STATE COURTS.**—Whilst the courts of the United States are not foreign courts in their relation to the State courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them. In all cases the jurisdiction of a State court may be inquired into when its judgment

- is made the foundation of a claim in the Circuit Court, but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination. *Id.*
7. PRESUMPTIONS IN FAVOR OF JUDGMENTS.—There is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. *Id.*
 8. PERSONAL JUDGMENTS ON SERVICE BY PUBLICATION.—There can be no personal judgment upon constructive or substituted service by publication against a non-resident of a State, except as a means of reaching property situated at the time within the State, or of affecting some interest therein, or determining the *status* of the plaintiff with respect to the non-resident party. *Id.*
 9. SERVICE BY PUBLICATION.—When constructive or substituted service by publication in a personal action is authorized by statute in place of personal citation, the statute must be strictly pursued. *Id.*
 10. HAHN *v.* KELLY DISAPPROVED.—The case of *Hahn v. Kelly*, decided by the supreme court of California, examined and disapproved. *Id.*
 11. SUITS IN REM—INFANTS.—Classification of suits *in rem*, and service of process upon infants of tender years, considered. *Id.*
 12. JURISDICTION—LEAVE TO RENEW MOTION.—Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew the motion. *Robinson v. Satterlee*, 134.
 13. DISTRICT JUDGE SITTING AS CIRCUIT JUDGE.—A judge of a United States District Court, while sitting alone as circuit judge in the United States Circuit Court, has the same powers and jurisdiction as any other judge sitting in the same court. *Id.*
 14. DISMISSAL OF BILL, FOR WANT OF REPLICATION.—Under the sixty-sixth equity rule prescribed by the United States Supreme Court, the order dismissing the complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to, or action by the judge. *Id.*
 15. SAME.—The dismissal is final unless set aside by the court upon application duly made within the proper time in pursuance of the provisions of the rule. *Id.*
 16. SAME—LACHES.—Where a bill has been dismissed for want of a replication under the sixty-sixth equity rule, a motion to set aside the dismissal made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied. *Id.*
 17. SUPPLEMENTAL ANSWER—FORMER JUDGMENT.—Where leave to set up by way of amended answer a former judgment between the same parties upon the same subject-matter had been denied, pending an appeal from the judgment sought to be set up, leave to file a supplemental answer setting up said judgment was granted upon renewal of the motion upon leave after the judgment had become final by affirmance on appeal. (Per HOFFMAN, J. See statement of the case.) *Id.*
 18. POWER OF A STATE OVER THE PROPERTY OF NON-RESIDENTS.—A State has the power to subject the property of non-residents, within its terri-

torial limits, to the satisfaction of the claims of her citizens against such non-residents by any mode of procedure which it may deem proper and convenient under the circumstances, and therefore may, for such purpose authorize a judgment to be given against such non-resident prior to seizure of such property, and with or without notice of the proceeding. *Neff v. Pennoyer*, 274.

19. **PROOF OF SERVICE IN CASE OF PUBLICATION.**—The proof of service required by section 269 of the Oregon Code to be placed in the judgment-roll includes in the case of service by publication, the affidavit and order for publication as well as the affidavit of the printer to the fact of publication. *Id.*
20. **JUDGMENT-ROLL NOT THE WHOLE RECORD.**—The judgment-roll required by said section 269 is not the exclusive record of the case, but only a collection of papers and entries selected from the record for convenience and economy and sufficient in the opinion of the legislature to show the judgment of the court and its jurisdiction to give it; but the record is a history of all the acts and proceedings in the action from its initiation to final judgment which includes all the papers filed in the case, and upon which the court acted in any step of the proceedings, and this record is of the same verity as the judgment-roll which is made up from it. *Id.*
21. **EVIDENCE NECESSARY TO AUTHORIZE ORDER FOR PUBLICATION.**—In case of service by publication the record must show that there was evidence presented to the court or judge who made the order for publication by affidavit, sufficient to prove the ultimate facts which bring the case within sections 55 and 56 of the Oregon Code, allowing such service; and it is not enough that the affidavit repeats the mere language of the statute, it must contain facts and circumstances sufficient to prove these ultimate facts; but when a judgment is attacked collaterally it is sufficient if the evidence contained in the affidavits *tends* to prove such facts. *Id.*
22. **EVIDENCE OF CAUSE OF ACTION.**—An averment in an affidavit for an order for publication, "that plaintiff has a just cause of action against defendant for a money demand on account," is a mere assertion of the fact of the existence of such cause of action—the opinion of the affiant to that effect, but is no evidence of it, and is therefore insufficient to authorize such order. *Id.*
23. **A VERIFIED COMPLAINT AN AFFIDAVIT.**—A verified complaint as to the facts stated therein, is an affidavit, and when it appears from the record that such a complaint, containing evidence of a cause of action against the defendant, was on file at the time of allowing an order for publication, the court will presume that such complaint was used as evidence therefor. *Id.*
24. **DILIGENCE TO ASCERTAIN THE PLACE OF RESIDENCE OF NON-RESIDENT DEFENDANT.**—Where an order allowing service of a summons by publication, under sections 55 and 56 of the Oregon Code omits to direct that a copy of the complaint and summons be mailed to the defendant, addressed to his place of residence, it must appear from the affidavit that the plaintiff had used reasonable diligence to ascertain such place of residence and that it is unknown to him. *Id.*

25. **PROOF OF PUBLICATION OF THE SUMMONS.**—Section 69 of the Oregon Code, having provided that in case of publication of the summons "the proof of service" shall be by "the affidavit of the printer or his foreman or his principal clerk," an affidavit to such a publication by one styling himself therein "editor," is not within the statute and therefore no evidence of the facts contained in it. *Id.*
26. **AVERMENT OF SERVICE IN JUDGMENT ENTRY.**—An averment of due publication of a summons in a judgment entry which appears from the whole record to be untrue or is not affirmatively supported by the facts contained in such record, is a nullity and may be disregarded. *Id.*
27. **PRESUMPTIONS IN FAVOR OF JURISDICTION.**—The common law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record or general jurisdiction had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action, but no such presumption does or ought to apply in cases where the defendant is a non-resident and there was no appearance and only constructive service of the summons by publication. *Id.*
28. **EXPENSES OF PRINTING BRIEF.**—Section 918 of the Revised Statutes gives to the Circuit Court power to regulate the practice therein, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the Supreme Court: *Held*, that under this authority the court might, by general rule or special order in a particular case, require parties to a cause submitted to it for decision to file printed briefs, and might tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement. *Neff v. Pennoyer*, 335.
29. **DAMAGES FOR WITHHOLDING POSSESSION AND DEFENSE THERETO.**—In action to recover damages for wrongfully withholding the possession of real property, the plaintiff may allege and recover for any particular waste or injury committed by the defendant thereon during his possession, or he may omit all claim other than that arising from such waste or injury, but he cannot by so doing preclude the defendant from showing that the alleged waste or injury was committed while he was in the possession of the premises, claiming title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts. *Neff v. Pennoyer*, 495.
30. **IMPROVEMENTS—COUNTER-CLAIM FOR.**—To enable a defendant to maintain a counter-claim for the value of improvements made upon the premises of another, it must appear therefrom that the improvements are affixed to the freehold and still existing, and that they better the condition of the property for the ordinary purposes for which it is used; and that they were made while the defendant, or those under whom he claims, were in possession under color of title, in good faith, adversely to the claim of the plaintiff. (Or. Civ. Code, Sec. 318.) *Id.*
31. **SAME SUBJECT.**—A counter-claim not containing these allegations, but only a statement of facts tending to prove them, will be stricken out as irrelevant. *Id.*

32. ADVISING VERDICT.—Where, upon the evidence, the court is satisfied that there should be no recovery,* and that a verdict, if found for the plaintiff, would necessarily be set aside for want of evidence to justify it, the jury will be advised to find for the defendant. *Kielley v. Belcher Silver Mining Co.*, 500.
33. DEDIMUS, WHEN GRANTED.—Section 866 of the Revised Statutes gives the courts of the United States power to grant a *dedimus* to take the examination of a witness whenever in their judgment it may be necessary to prevent a failure or delay of justice; and sections 863-4-5 of said Revised Statutes, relating to taking depositions *de bene esse* have no application to the granting or execution of said *dedimus*. *Jones v. Oregon Central Railroad Co.*, 523.
34. SAME, HOW ISSUED AND EXECUTED.—The mode of issuing and executing a *dedimus* granted in pursuance of said section 866 is regulated by "common usage" or practice, which usage or practice, as to this court, is prescribed by sections 807-8-9 of the Or. Civil Code, relating to taking depositions on commission; and title 7 of chapter 9 of said Code, relating to taking depositions *de bene esse* does not apply. *Id.*
35. COMMISSIONER TO EXECUTE DEDIMUS.—A person appointed to execute a *dedimus* represents the court and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in section 809 of the Or. Civil Code. *Id.*
36. CERTIFICATE TO DEPOSITION.—In certifying the deposition to the court it is not necessary for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn. *Id.*
37. OATH OF WITNESS.—A witness examined under a *dedimus* should be sworn according to the law of the forum whence it issued. *Id.*
38. SAME SUBJECT.—Section 860 of the Or. Civil Code having provided that an affirmation may be made by any person in place of an oath, a *dedimus* which authorizes the commissioner to administer an oath to a witness, is well executed in this respect when it appears from the return thereto that the witness was duly affirmed. *Id.*
39. RETURN TO DEDIMUS.—A return to a *dedimus* need not show how a witness was sworn or affirmed, if it states substantially that the witness was duly sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, if they are plainly referred to, and included by the commissioner in certifying the deposition as a part of the proceeding and return. *Id.*
40. STAY OF PROCEEDINGS.—A stay of proceedings in bankruptcy in the District court, is in the discretion of the Circuit Court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below. *In re Oregon Bulletin Co.*, 529.
41. JUDGMENT.—A court has power to set aside or modify its judgments, in both civil and criminal cases, during the term at which they were given. *United States v. Harmison*, 556.

42. JUDGMENT TECHNICALLY CORRECT REVERSED.—Where a judgment is broader in its scope, and more advantageous to a party than he is entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

See APPEAL.

PRESUMPTIONS.

1. PRESUMPTION AS TO LAND TITLES IN CALIFORNIA.—All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that the title is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that State. *Patterson v. Tatum*, 164.

See JUDGMENTS, 1; PRACTICE, 25.

PROBATE LAW.

See ADMINISTRATOR.

PROMISSORY NOTES.

1. LIMITATION—NOTE PAYABLE ON DEMAND.—A note payable on demand, whether with or without interest, is immediately due. An action may be maintained upon such a note without previous demand, and the statute of limitations begins to run from its date. *Bartlett v. Rogers*, 62.
2. SAME.—But if there be any exception in the case of a note bearing interest, a note which does not in terms call for interest, is not within the exception. *Id.*
3. ACCORD AND SATISFACTION.—Where a debtor transfers specific property to trustees for the use of the creditors, under a mutual agreement signed by the creditors, whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction. *Id.*
4. SAME.—Such accord and satisfaction held good as against the indorsee of a promissory note payable on demand, given by the debtor to one of the parties to said agreement, who held no other demand against the debtor, where it did not appear that the transfer of said note was made before the date of such accord and satisfaction. *Id.*

See BANKRUPTCY, 6, 7, 8.

PUBLICATION OF SUMMONS.

See PRACTICE, 6, 7.

PUBLIC LANDS.

1. FIVE HUNDRED THOUSAND ACRES GRANT TO STATE.—The grant to the State by the act of Congress of September 4, 1841, of 500,000 acres, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of

the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at the date of the selection be reserved from sale by any act of Congress or proclamation of the President. When the selection and location are once made pursuant to the State's directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent. The patent takes effect by relation as of the date of the selection. *Patterson v. Tatum*, 164.

2. **COMMISSIONER OF LAND OFFICE, DUTIES.**—The commissioner of the general land office is attached to the Department of the Interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The legislation of Congress respecting his office stated. *Id.*
3. **REPEALS BY REVISING ACTS.**—The doctrine that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, does not apply when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act. *Id.*
4. **PRESUMPTION AS TO LAND TITLES IN CALIFORNIA.**—All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that the title is obtained directly from the government, the legal presumption is, that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that State. *Id.*
5. **PATENT, A GOVERNMENT CONVEYANCE.**—A patent is the instrument by which the government, whether State or National, passes its title; it is the government conveyance. But if the government possesses at the time no title, that fact may be shown in an action of ejectment. The patent is evidence of title, only because government, being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. A court of law is as competent to pass upon the question whether a title existed at the time in the government, as it is whether the title existed in an individual, where the grantor is a private party. The cases where a party must resort to a court of equity for relief against the operation of a patent stated. *Id.*
6. **THE TITLE OF THE CITY OF SAN FRANCISCO**, under the Mexican law, was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portion of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties. *United States v. Carr*, 478.
7. **LANDS OCCUPIED FOR PUBLIC USES WITHIN EXCEPTIONS OF ACT OF CONGRESS.**—As against parties having no title in themselves, holding by intrusion, mere trespassers, the possession of the government for a

hospital for infirm and disabled seamen, of a part of the four lots in the city of San Francisco, upon which the hospital is situated, under a deed from the city authorities, with claim to the remainder of the lots for the same purposes, and the assertion of that claim by the removal of the intruders, is an occupation for public uses of the whole premises, within the meaning of the act of Congress of 1864, which excepts from the grant to the city "all sites or other parcels of land" which had been or were then occupied for such uses by the United States. *Id.*

8. DEDICATION TO PUBLIC USES.—The setting apart of the premises for a hospital by direction of the government, with the appropriation by Congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act of March 8, 1866, both of which excepted from confirmation to the city parcels of land which had been previously reserved or dedicated to public uses. *Id.*

See CRIMINAL LAW, 14, 15, 16; MEXICAN GRANTS; MINING CLAIMS.

RECORD.

See PRACTICE, 18.

REGISTER OF LAND OFFICE.

See CRIMINAL LAW, 14, 15, 16.

REMOVAL OF CAUSES.

See UNITED STATES COURTS, 5.

REPEAL OF STATUTES.

1. STATUTE REPEALED BY IMPLICATION.—Where a statute revising another act embraces the entire subject-matter of the prior act, with additional provisions, it must be regarded as a substitute for, and as repealing such prior act. *United States v. Cherseman*, 424.
2. STATUTE REPEALED.—The act of Congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 294-7), embraces the entire subject-matter of section 2 of the act of December 25, 1862 (12 Stat. 632), and repeals the latter section. *Id.*

See REVISED STATUTES.

RES ADJUDICATA.

1. DEFENSES IN ABATEMENT AND ON MERITS.—Under the statute of Nevada authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be *res adjudicata*, and the parties will be estopped from further litigating the merits, even though the issues upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

2. **SAME.**—In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to very matter of fact in issue, and in fact found by the court in favor of the defendant. *Id.*
3. **SEVERAL DEFENSES IN SAME ANSWER.**—Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses, and where all are in fact determined, the determination as to all will be conclusive between the parties. *Id.*

REVISED STATUTES.

1. **REVISED STATUTES AND OTHER ACTS PASSED AT SAME SESSION.**—The Revised Statutes must be regarded as passed on the first day of December, 1873, and all other acts of the same session of Congress passed that date are to be treated as subsequent acts, repealing the Revised Statutes, so far as they are inconsistent therewith. *In re Oregon Bulletin Printing and Publishing Co.*, 614.
2. **AMENDATORY BANKRUPT ACT OF 1874 CONSTRUED.**—The act of June 22, 1874 (18 Stat. 178), purporting to amend and supplement the Bankrupt Act of 1867 must be regarded as having passed after the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed, in the corresponding provisions of the Revised Statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. *Id.*

REVENUE.

1. **BOND FOR VALUE—APPRAISEMENT.**—Where property under bond for duties is seized in a warehouse, the bond for value under the 89th section of the act of 1799 should represent its full market value, duties included. *United States v. Cargo of Sugar*, 27.
2. **ENTRY DEFINED.**—The term "entry," as used in section 1 of the act of March 3, 1863, must be understood to include the series of acts done by the importer at the custom-house necessary to the introduction of his merchandise into the United States, in compliance with the forms of law. *Id.* 46.
3. **FALSE DOCUMENT OR APPLIANCE.**—If, in the performance of these acts, and as a means of making the entry, the importer is guilty of any false or fraudulent practice or appliance, or uses any false or fraudulent document, he comes within the law. *Id.*
4. **AGENT.**—Whether the agent who makes the entry had knowledge of the fraud is immaterial. The guilty knowledge of the owner is sufficient. *Id.*
5. **FRAUDULENT APPLIANCE.**—Where charcoal had been mixed with sugar above No. 12 Dutch standard in color, for the purpose of reducing its grade, and making it appear to be below No. 12 Dutch stand-

ard in color, and the importer failed to disclose that fact to the custom-house authorities: *Held*, that the color of the sugar was not thereby altered; it was merely disguised, and the concealment and suppression of that fact by the importer at the time of taking his oath and making his entry, and the oath taken by him, constituted "a false and fraudulent practice and appliance" within the meaning of the law; and this notwithstanding that the law does not require that the color of the sugar be stated in the invoice or entry. *Id.*

6. COLLECTOR DECEIVED.—Whether the collector was deceived by the attempted fraud, is immaterial. *Id.*
7. MISTAKE OF LAW.—The belief on the part of the importer that he might lawfully put charcoal into his sugar, and thus alter its grade, and enable himself to lawfully enter them as of a lower grade, and that he might lawfully withhold from the custom-house authorities knowledge of the facts, will be no protection to him. *Id.*
8. FORFEITURE—INTENTION TO DEFRAUD.—Where, in a suit brought by the United States to recover the value of certain goods alleged to have been fraudulently invoiced below their true cost, it appeared that the defendant was not the owner or shipper of the goods, but merely a consignee thereof for the purpose of selling them: *Held*, that knowledge on his part of the fraudulent under-valuation was necessary to establish the "actual intention to defraud the United States" within the meaning of the sixteenth section of the act of June 22, 1874. *United States v. Newmark*, 584.

SALVAGE.

1. SALVAGE.—Sixteen thousand dollars awarded as salvage compensation, where both vessels belonged to the same owners. *P. M. S. Co. v. Ten Bales Gunny Bags*, 187.
2. SALVAGE—TOWAGE.—Ten thousand dollars awarded as salvage compensation. *Steamer Costa Rica*, 610.

SAN FRANCISCO.

See PUBLIC LANDS, 6, 7, 8.

SEAMEN.

1. DESCRIPTION OF VOYAGE.—Under the merchant shipping act of England of 1873, the shipping articles need only specify the maximum duration of the engagement of a seaman, and the places or parts of the world to which it does not extend: *Held*, that a specification of the places to which the voyage or engagement might extend, was an implied agreement that it was not to extend to any other, and therefore a sufficient compliance with the act. *The Hermine*, 80.
2. SUIT FOR WAGES AGAINST FOREIGN SHIP.—A Court of Admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master. *Id.*
3. SAME SUBJECT.—*Semble*, that the court will not decline jurisdiction where it appears the seamen have been discharged with their own con-

sent before the expiration of the voyage, without the payment of wages already earned, or any agreement or understanding concerning them. *Id.*

4. DESERTION.—A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not, and therefore where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion. *Id.*
5. CONTRACTS WITH SEAMEN.—Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside or disregarded by Courts of Admiralty if inequitable. *Id.*
6. QUANTUM MERUIT.—*Quantum meruit*, what seamen entitled to on. *Id.*
7. RESCISSION OF SEAMAN'S CONTRACT.—Where, on a voyage from Glasgow to Buenos Ayres, from thence to Portland, Or., and back to a port in the United Kingdom, the cook and steward, who is not a seaman, is disrated a few days out from Buenos Ayres on a charge of wasting provisions, and put before the mast, it amounts to a rescission of the contract by the master, and the steward may, when he arrives at Portland, accept such rescission, and claim his discharge; but what compensation, if any, he shall have for his services depends upon the particular circumstances of the case. *The Hotsapur*, 194.
8. CONTRACT AND SERVICES OF MINOR.—A contract by a minor to serve as a seaman is a voidable one, and may be avoided by such minor at any time before its completion, and thereafter he is not bound by it in any manner, neither can he sue upon it for his services, but may recover the value of such services, allowing for any injury which the owners may sustain by reason of the avoidance of the contract. *Id.*
9. BRITISH SHIPPING ACT.—Where, under the British merchants' shipping act of 1854, the duration of a voyage is described in the shipping articles as *probably* twelve months, a seaman signing the articles engages absolutely to make the voyage, whether the duration of it be more or less than that period, provided the master in good faith endeavors to accomplish the voyage within the time mentioned. *Id.*
10. RIGHT OF MASTER TO DISCHARGE SEAMAN FOR MISCONDUCT.—Where the first mate of a ship, before leaving the home port, became so intoxicated as to be disobedient, insolent to the master, and negligent in his duty: *Held*, That the master was justified in discharging him, while in the home port, for that one offense. *The Ship Garnet*, 350.
11. ABANDONMENT OF A SEAMAN IN A FOREIGN PORT.—Defense by master that the seaman was detained on shore by the municipal authorities of the port: *Held*, unsupported by the proofs. *The Mary Belle Roberts*, 485.
12. DESERTION BY SEAMAN.—When a seaman, against the orders of the master and knowing that the ship was about to sail, went ashore and failed to return to the ship, and subsequently, when apprehended by the master, broke away from his custody, and it appeared that further delay would have imperilled the ship: *Held*, that this conduct amounted to a desertion, and that the wages due the seaman were forfeited. *The Ship Ericson*, 559.

13. *ALITER*.—Where he has gone ashore by permission and without knowing that the ship was about to sail, and his failure to rejoin her is caused by drunkenness, but without any intention on his part to desert, but a qualified forfeiture will in such case be imposed. *Id.*

See *ADMIRALTY*, 34.

SOLDIER.

See *COMMON CARRIER*, 2, 3.

SPIRITUOUS LIQUORS.

See *INDIAN AND INDIAN COUNTRY*, 3, 4, 5, 6, 7.

STATUTES CONSTRUED.

1870. Act May 31, Sec. 16, 16 Stat. 144. Civil Rights, 59.
 1799. Act May 2, Sec. 89. Bond for Goods Seized, 27.
 1872. Act June 1, Sec. 5, 17 Stat. 197. Survivor of Cause of Action, 44.
 1863. Act March 3, Sec. 1. Entry; Disguising Goods, 46.
 1860. Act June 14, Sec. 5, 12 Stat. 34. Mexican Grants, 66.
 1874. Act June 22, Sec. 39, Amendment 18 Stat. 181. Bankruptcy, 123.
 1868. China Treaty July 28, Art. VI. Unequal Taxation, 145.
 1850. Act June 5, 9 Stat. 437. Indians, 161.
 1834. Act June 30, Sec. 20, 4 Stat. 732. Indians, 161.
 1864. Act March 15, Sec. 1, 13 Stat. 29. Indians, 161.
 1873. Act February 14, 17 Stat. 463. Indians, 161.
 1874. Revised Stat., Sec. 829. Marshal's Expenses and Fees, 237.
 1825. Act March 3, Sec. 12, 4 Stat. 118. Extortion, 302.
 1868. Act July 27, Sec. 1, 15 Stat. 240. Extortion and Alaska, 302.
 1874. Revised Stat., Sec. 730, Jurisdiction of Offenses in Alaska, 302.
 1874. Revised Stat., Sec. 5481. Extortion; Alaska, 302.
 1834. Act, Secs. 20, 21, 23, 4 Stat. 732. Indians, 316.
 1874. Revised Stat., Secs. 5952-6. Copyrights, 331.
 1874. Revised Stat. Sec. 2139. Selling Liquors to Indians, 337.
 1850. Act June 5, Sec. 5, 9 Stat. 439. Liquor; Indians, 337.
 1870. Revised Stat., Sec. 4192. Mortgage on Vessel, 405.
 1864. Act June 4, 13 Stat. 294-7. Revenue Stamps, 424.
 1862. Act December 25, 12 Stat. 632. Revenue Stamps; Bonds, 424.
 1846. Act August 6, Secs. 6-7, 9 Stat. 60. Assistant Treasurer; Bond, 424.
 1850. Act May 23, 9 Stat. 436. Assistant Treasurer; Bond; Bullion Fund, 424.
 1870. Act, Sec. 53, 16 Stat. 205. Patents; Re-issues, 448.
 1874. Revised Stat., Secs. 863-5. Commission to take Testimony, 523.
 1875. Act March 3, Sec. 2, 18 Stat. 470. Removal Causes; National Courts, 553.
 1874. Revised Stat., Sec. 3893. Quack Advertisements in Mails, 565.
 1874. Revised Stat., Sec. 4597. Official Log-book, 602.
 1874. Revised Stat., Secs. 6021-3. Corporations; Involuntary Bankruptcy, 614.
 1874. Act June 22, 18 Stat. 178. Involuntary Bankruptcy; Corporation, 614.

1866. Act July 26, 14 Stat. 251. Water Rights and Mining Claims, 634.
 1870. Act July 9, 16 Stat. 270. Mining Claims, 634.
 1872. Act May 19, 17 Stat. 91. Mining Claims, 634.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES, REPEALS OF.

1. REPEALS BY REVISING ACTS.—The doctrine that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, does not apply when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act. *Patterson v. Tatum*, 164.

See REVISED STATUTES.

STOPPAGE IN TRANSITU.

1. PURCHASE AND SALE OF WHEAT.—Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard, at Portland, at \$1.85 per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one-half of the money necessary to make the purchase, and to receive one-half of the profits, if any: *Held*, that the joint venture and the interest of C. & Co. in the wheat ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & H. as sellers of the same, to exercise the right of stoppage *in transitu*, and that when, upon the failure of M. & H., said L. & H. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the same, and not that of C. & Co., who were not the sellers of the wheat to M. & H., and had no power over it or interest in it. *In re Comstock*, 320.

SUMMONS, PUBLICATION OF.

See PRACTICE, 5-7, 17, 19, 20-24.

SURETIES.

1. LIABILITIES OF SURETIES.—The liabilities of sureties are *strictissimi juris*, and cannot be extended beyond the reasonable necessary import of the language of the bond. *United States v. Cheeseman*, 424.
2. SURETIES ON ASSISTANT-TREASURER'S BOND.—Subsequent to the passage of the act of Congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 223), the Assistant-Treasurer of the United States and Treasurer of the branch mint at San Francisco, gave an official bond in pursuance of sections 6 and 7 of the act of August 6, 1846, to provide for the reorganization of the treasury, etc. (9 Stat. 60), and conditioned in the language of said sections; also referring to the act of May 23, 1850, providing for a bullion fund (Id. 436), but not containing the conditions prescribed for stamp agents' bonds by section 170 of said act of June 30, 1864, and not making any reference to said act or duties; which bond was accepted by the Secretary of the Treasury:

Held, that the sureties on said bond, given as assistant-treasurer and treasurer of the branch mint, are not liable for any default of their principal occurring in the performance of the duties of stamp agent, in pursuance of the provisions of said section 170 of said act of June 30, 1864. *Id.*

TAXES.

1. **ASSESSMENT, WHEN VOID FOR UNCERTAINTY.**—An assessment of real property should substantially comply with the requirements of the statute (Or. Code, p. 898) which requires each tract or parcel of land to be designated according to the United States surveys, if it be a subdivision of the same, or otherwise by specific metes and bounds or other certain description; therefore an assessment to the O. C. M. R. Co. of 196,008.99 of acres of land in Jackson county, in gross, without any other designation or description of the same, is void for uncertainty. *Tilton v. Oregon Central Military Road Co.*, 22.
2. **SAME SUBJECT.**—An assessment of real property which contains no valuation of the same except this: "Total value of taxable property, 245,011," there being no mark or sign to indicate whether such figures were intended to represent eagles, dollars, cents, or mills, or other thing capable of being numbered, is void for uncertainty. *Id.*
3. **COLLECTION OF TAX, WHEN RESTRAINED.**—A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof. *Id.*
4. **TAX DEED, A CLOUD ON TITLE.**—Under the laws of Oregon (1865, p. 10), a tax deed is primary evidence of title and the regularity of the prior proceedings, which evidence can only be overcome by the proof of certain facts *dehors* the deed; therefore the same casts a cloud upon upon the title of the property. *Id.*
5. **TAX DEED.**—The general statute authorizes a tax collector for State and county taxes to execute a deed upon a tax sale, and further provides that such deed shall be *prima facie* evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the State and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be *prima facie* evidence of the regularity of the prior proceedings. *Minturn v. Smith*, 142.
6. **TAX DEED—CLOUD ON TITLE.**—A void tax deed which the statute does not make *prima facie* evidence of the regularity of the assessment and sale, does not cast a cloud upon the title. *Id.*
7. **TAX SALE—INJUNCTION.**—An injunction will not be granted to restrain the collection of a tax, where the deed issued upon a sale for taxes would not cloud the title. *Id.*
8. **TAXES PAID BY PARTY IN POSSESSION.**—In an action for damages for withholding the possession of real property, if the defendant held

under color of title in good faith adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding are a proper subject of counter-claim. *Neff v. Pennoyer*, 495.

TENANTS IN COMMON.

1. TENANTS IN COMMON. OUSTER.—One tenant in common may oust his co-tenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession, they deal at arms-length, and there is no longer any relation of trust or confidence between them. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

TITLE.

1. TITLE UNDER STATUTES OF LIMITATIONS.—Adverse possession for the time limited by statutes of limitations not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder. *The 420 Mining Co. v. The Bullion Mining Co.*, 634.

TOWAGE.

See SALVAGE, 2.

TRUSTEE.

See ADMINISTRATOR.

UNITED STATES COURTS.

1. UNITED STATES COURTS—STATE LAWS.—The courts of the United States are not bound by the decisions of the State courts upon questions of general law. It is only decisions upon local questions which are peculiar to a State, or adjudications upon the meaning of the constitution or statutes of a State, which the courts of the United States adopt as rules for their judgments. *Galpin v. Page*, 93.
2. RELATION OF NATIONAL COURTS TO STATE COURTS.—Whilst the courts of the United States are not foreign courts in their relation to the State courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them. In all cases the jurisdiction of a State court may be inquired into when its judgment is made the foundation of a claim in the Circuit Court, but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination. *Id.*
3. IDEM—REMOVAL TO A TERRITORY.—For an offense against the United States committed in an organized Territory, the offender may be arrested in any district of the United States, and removed to the Territory for trial, if the territorial courts have cognizance of the offense.—*United States v. Huskins*, 262.
4. IDEM.—Territorial courts are "courts of the United States," as that designation is applied in section thirty-three of the Judiciary Act. *Id.*
5. REMOVAL OF SUITS FROM STATE TO NATIONAL COURTS.—A suit was pending in the Supreme Court of California on appeal from the judg-

ment of the District Court at the date of the passage of the act of Congress of March 3, 1875, relating to the jurisdiction of the United States Circuit Court, in which the judgment was reversed and the cause subsequently remanded to the District Court for new trial. At the first term of the District Court at which a trial could be had after the filing of the remittitur and before any other trial, the suit was removed to the United States Circuit Court on application of the plaintiff: *Held*, That the case is within the provisions of sections 2 and 3 of said act of Congress, and that it was properly removed. *Hoadley v. City of San Francisco*, 553.

UNITED STATES MAILS.

See CRIMINAL LAW, 28-31.

VERDICT.

See INSTRUCTIONS.

VOID AND VOIDABLE.

See ADMINISTRATOR, 15, 16; CORPORATION; GUARDIAN, 1-5.

WILL.

1. WILL—FOREIGN PROBATE.—The probate of a will and issue of letters testamentary in the State of New York, do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the State of California. *Bartlett v. Rogers*, 62.
2. OBJECTION—WHEN TAKEN.—The objection may be taken at the hearing, where it does not appear on the face of the complaint where letters are issued, and issue has been joined on the allegation of the complaint that letters testamentary have been duly issued to the plaintiffs. *Id.*





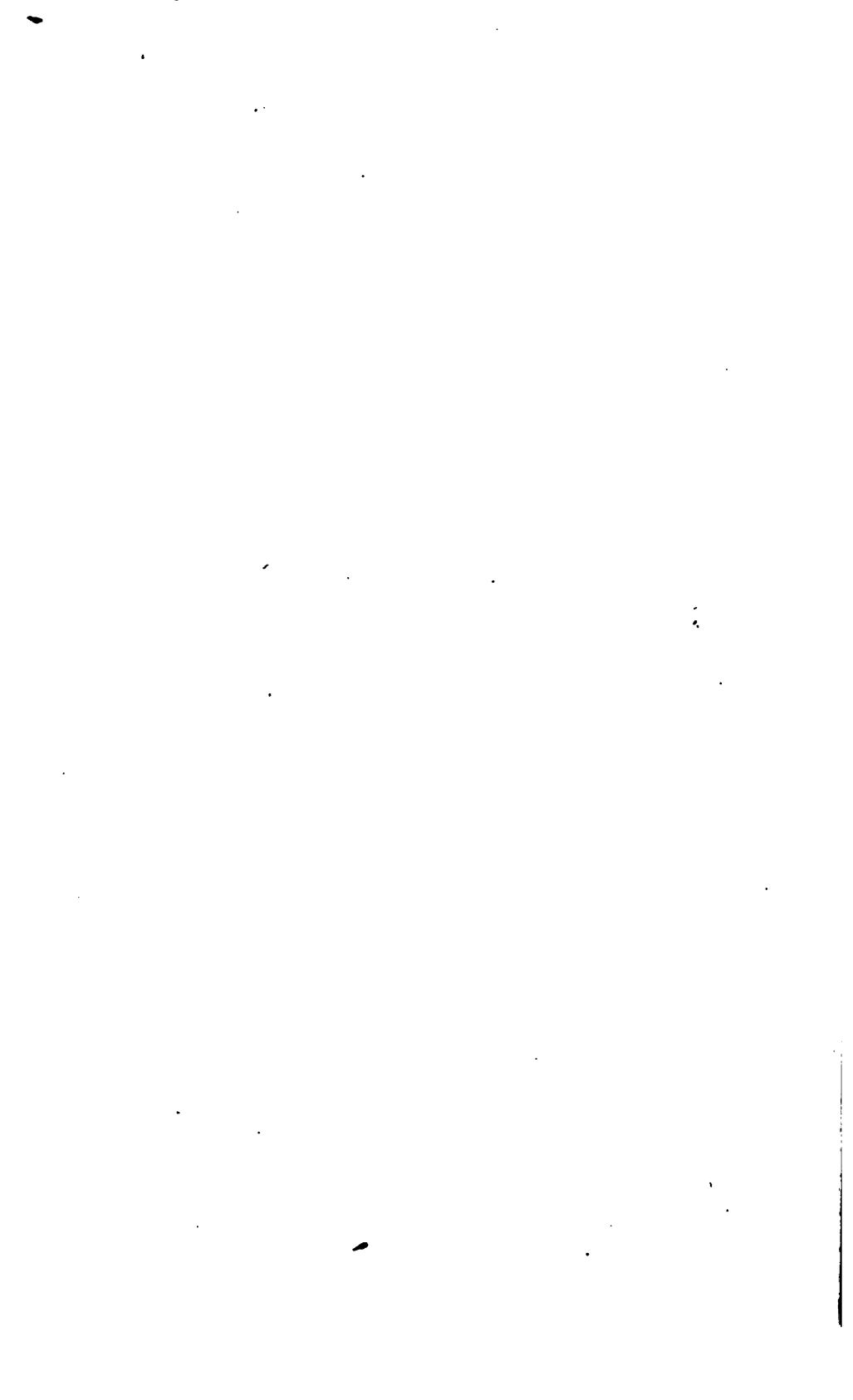
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